

EXHIBIT B

1 IN THE DISTRICT COURT OF THE UNITED STATES
2 FOR THE NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION

4 IN RE:
5 NATIONAL PRESCRIPTION
6 OPIATE LITIGATION

Case No. 1:17-md-2804
Cleveland, Ohio

March 28, 2024
9:36 a.m.

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10 TRANSCRIPT OF DISCOVERY CONFERENCE PROCEEDINGS

11 BEFORE THE
12 SPECIAL MASTER DAVID R. COHEN.
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Proceedings recorded by mechanical stenography;
transcript produced by computer-aided transcription.

1 THURSDAY, MARCH 28, 2024, 9:36 A.M.

2 SPECIAL MASTER COHEN: Good morning,
3 everybody.

4 If I haven't met you, I'm David Cohen.

09:36:50 5 Welcome to Cleveland. It's a sunny day,
6 not what we usually get, so enjoy it.

7 All right. So first of all, we've got an
8 open phone line. People are listening and they are muted
9 to us. They are not muted to each other, which means
09:37:06 10 that if you hear kids and dogs screaming in the
11 background, it's because somebody on the phone hasn't
12 muted themselves. And everybody on the phone can talk to
13 each other, but we're not going to hear you.

14 Both for people on the phone and also for
09:37:23 15 our court reporter Sue Trischan, if you would speak into
16 the microphone, that would be great.

17 Also, Sue is very good and knows some of
18 you but not all of you, and I don't either, and so if
19 every time you would identify yourselves for the record,
09:37:39 20 I think that would be helpful for the transcript and for
21 everybody here.

22 So thank you all for coming. It was a
23 little bit of short notice, but it felt like we had
24 enough to talk about that it made sense to get together.
09:37:50 25 Some of you folks can actually look each other in the

1 eye, see who it is that you're talking to when you're
2 arguing on the phone when I'm not around, and maybe make
3 some progress that way.

4 So what my plan is today is to go through
09:38:08 5 all of the agenda issues, not in the order they are
6 listed.

7 I may rule on some of them. I make take
8 some of them under advisement. I may give you some
9 suggestions on how you can go forward.

09:38:27 10 And we'll probably take lunch, you know,
11 12:00, 12:30, depending on how it goes. Is everybody
12 flying out today? Everybody flying out this afternoon?
13 What's the earliest flight that people have to get to?

14 3:00 o'clock?

09:38:45 15 MR. BADALA: 11:00 o'clock.

16 SPECIAL MASTER COHEN: 1:00 o'clock, is
17 that what you said? You're going to miss your flight.

18 I imagine we won't last until 2:30, I'm
19 guessing that it won't take that long, but we'll see. So
09:38:57 20 hopefully that gets everybody to where they need to be.

21 Okay. So with that, we'll get started.

22 The first thing I want to talk about is
23 DR-22. This is a bit of a cleanup, I think.

24 My sense is that after the Judge issued his
09:39:15 25 recent order on the motion to disqualify Motley Rice,

1 that his discussion of DR-22 was clarifying.

2 And so I don't care who goes first, but if
3 somebody could tell me where that is and whether there
4 are any issues that still need to get mopped up.

09:39:40 5 MR. FARRELL: I don't care --

6 SPECIAL MASTER COHEN: If no one talks, I'm
7 going to assume everything is happy and fun.

8 MR. FARRELL: I don't think everything is
9 happy and fun, but I think it's on the direction. This
09:39:48 10 is Paul Farrell on behalf of the plaintiffs.

11 So we believe that or the PEC takes the
12 position that the order from Judge Polster on the
13 disqualification motion sets forth the obligations under
14 DR-22 as it applies to the PBM litigation.

09:40:13 15 So DR-22, as the order references, is more
16 than just a single discovery ruling. It incorporates
17 rulings that came before and rulings that came after,
18 some of which were adopted in formal orders from Judge
19 Polster.

09:40:36 20 We'd also note that the order includes a
21 specific reference that unappealed orders from you,
22 Special Master Cohen, in the history of this litigation
23 has force and effect as if issued from the bench.

24 So we believe that the expectations from
09:40:58 25 DR-22 are now made clear.

1 With regard to Express Scripts and its
2 family of defendants, we believe that they have
3 identified and, as of March 15th, uploaded their complete
4 response to DR-22.

09:41:19 5 I'm unaware, sitting here today, that there
6 is anything in addition that they -- that Express Scripts
7 has not uploaded to the server.

8 That being said, as we are getting ongoing
9 notices that they are continuing their duty and
09:41:38 10 recognizing the obligation runs forward, so to the extent
11 that the PEC can identify additional areas of DR-22,
12 we'll continue that process.

13 Optum, the Optum family defendants, I
14 believe in their most recent correspondence which has
09:41:59 15 been within maybe even this week, I believe they have,
16 while withholding or reserving their right to appeal the
17 disqualification motion, I believe that they have
18 presently acknowledged they intend to comply with DR-22.

19 They have acknowledged that there are
09:42:19 20 additional documents that need to be disclosed, and that
21 they are in the process of complying with DR-22 and that
22 it will take some time.

23 So presently, other than the fact that they
24 need additional time to comply, I don't think the debate
09:42:39 25 any more is whether they must comply.

1

2 MS. SINGER: Can I add one point to that?

3 Pete, you can still sit.

4 Linda Singer for the plaintiffs.

09:43:02 5 The only thing I would add, Special Master
6 Cohen, to Paul's report is the PEC has asked, pursuant to
7 prior discovery orders, that there be a list of DR-22
8 applicable matters which would allow us to evaluate fully
9 whether they are complete.

09:43:19 10 SPECIAL MASTER COHEN: Okay. So from the
11 plaintiffs' description, my sense is there is nothing for
12 me to resolve.

13 That's why I am here is to resolve
14 disputes, and I don't think I'm hearing anything that you
09:43:28 15 are suggesting I need to do, except turn to the
16 defendants and say, "Does that sound right and do you
17 think that you're going to get to where you need to get
18 to pretty quickly?"

19 MR. COOPER: Special Master Cohen, this is
09:43:41 20 Jonathan Cooper for the Express Scripts defendants.

21 I think, in answer to your question, I
22 agree. I don't believe there's a live dispute on this
23 issue right now.

24 To update Mr. Farrell's comments, we did
09:43:54 25 make an additional DR-22 production just this morning, so

1 obviously I don't expect the plaintiffs to have had a
2 chance to look at that yet.

3 And I do want to make clear, we are, in
4 light of Judge Polster's ruling last week, we are going
09:44:06 5 back, we have gone back and actively looking to see if
6 there are any additional productions in our possession
7 that should be produced under DR-22.

8 So that process is ongoing right now.

9 Like I believe I said this in an e-mail
09:44:20 10 last week, we're aiming to try to complete that within
11 the next, I believe, two-and-a-half weeks from this
12 point.

13 Obviously we understand the obligation's
14 ongoing, so if we learn more down the line, we will
09:44:32 15 produce those promptly once we learn about them.

16 SPECIAL MASTER COHEN: Thank you.

17 MR. HATCHETT: This is Andrew Hatchett for
18 the Optum defendants.

19 With respect to DR-22, at the time of the
09:44:44 20 disqualification motion, the only matters that I'm aware
21 of that were in dispute as to whether or not they were
22 within the scope of DR-22 were the three Motley Rice-lead
23 investigations that we identified in those papers.

24 Everything else that we are in the process
09:45:00 25 of producing or have produced, I think that we had always

1 agreed were subject to DR-22. It's just a process for
2 rolling those out.

3 With respect to the three Motley Rice
4 investigations -- so that was the Hawaii, the D.C. and
09:45:13 5 the Chicago investigations -- in response to Judge
6 Polster's order, we are preparing to produce those
7 materials.

8 Some of them have been produced. I think
9 the only ones that we're missing today are the documents
09:45:26 10 related to the City of Chicago investigation. We did not
11 have those in our possession, and so we are gathering
12 those from the counsel that lead those investigations and
13 are preparing them for production.

14 As we said in the e-mail, and as
09:45:42 15 Mr. Farrell accurately summarized, you know, we do
16 disagree with the discussion of DR-22 as it relates to
17 the three Motley Rice-lead investigations.

18 Our concern is that, you know, those
19 investigations are investigations that the plaintiff, the
09:45:56 20 PEC, has said were not opioid-related. We have
21 acknowledged that opioid documents were found in those
22 productions.

23 Documents -- and when I say "opioid
24 documents," I just mean it could be a spreadsheet that
09:46:09 25 references a ton of drugs, including an opioid. It could

1 be a document that references a lot of manufacturers and
2 includes Purdue. There are issues in those documents
3 that may relate to the issues in this case, but the
4 investigations themselves were not opioid-related.

09:46:24 5 And so --

6 SPECIAL MASTER COHEN: All right. So let
7 me touch on that real quick.

Sometimes the Court said "Opioid-related investigations" and sometimes the Court said "Documents that are related to opioids."

14 And it was the -- I think it was the
09:46:52 15 shareholders suits that Walmart ended up getting
16 sanctioned where the Court made very clear, look, we're
17 talking about documents. So it doesn't matter if it's an
18 opioid-related investigation. It could be an
19 insulin-related investigation as a hypothetical, but if
09:47:06 20 in the insulin-related investigation there are documents
21 that are opioid-related, and even if you didn't realize
22 it at the time for good reason, but it becomes clear like
23 it is now that there are opioid-related documents in a
24 nonopioid-related investigation, those have to be
09:47:22 25 produced under DR-22.

1 That's my view. I think that's the Court's
2 view. I think that's the view that you all should take
3 going forward.

4 So I just want to be clear that every time
09:47:32 5 you refer to -- and maybe you're not doing it on purpose,
6 right? But every time you refer to opioid-related
7 investigation, it causes dissonance.

8 That's not what we're talking about any
9 more.

09:47:43 10 MR. HATCHETT: So we definitely understand
11 that to be what Judge Polster said in his order.

12 That is, I think, something that we have
13 concerns about, but we do understand that to be what the
14 order says.

09:47:52 15 I think the reason that we have concerns
16 about it is because, you know, the company over the years
17 has been involved in hundreds -- I mean, I don't know,
18 thousands of lawsuits.

19 And so, I mean, there's a question of is
09:48:02 20 there a burden now on an obligation for us to go into the
21 production files of every litigation we've ever been
22 involved in to assess whether or not there's a document
23 in that production file that discusses opioids, and then
24 produce it?

09:48:15 25 And then there's the second question of say

1 we have a patent litigation and so that patent litigation
2 has nothing to do with opioids, and an opioid document
3 was referenced in that production, do we now have an
4 obligation to reproduce the entirety of the production
09:48:28 5 file from the patent litigation? Or is it just that we
6 pull out the opioid-related documents?

7 So as we understand the Court's order with
8 respect to the three Motley Rice insulin investigations,
9 even though the investigations themselves were not
09:48:41 10 focused on opioids and even though many, many documents,
11 probably the majority of the documents have nothing to do
12 with any issue in this case -- I mean, I think the
13 Chicago investigation was about false claims; I don't
14 know all the details -- but unrelated to opioids, and so
09:48:59 15 we now understand that we are being required to produce
16 those documents into the MDL because a document or some
17 documents in those investigations related to opioids.

18 And so the result would be an enormous
19 volume of documents that have nothing to do with any
09:49:13 20 issue in this case that are now being swept into the
21 Court's order, so I don't know if you can provide clarity
22 on that aspect.

23 But with respect to where we are today, we
24 are complying with the Court's order and producing all
09:49:25 25 documents from the Hawaii, D.C. and Chicago

1 investigations, notwithstanding our objection that that
2 is well beyond what should be ordered in the MDL and is
3 beyond what Rule 26 would contemplate or require, but
4 we're going to comply with the order.

09:49:40 5 SPECIAL MASTER COHEN: Thank you.

6 So again, I don't think there's anything
7 for me to resolve.

8 I appreciate your asking me for
9 clarification. I'm a little reluctant to do that because
09:49:48 10 I think the Judge was trying to do that with his order.

11 I will say that with regard to patent
12 litigation, there was an order somewhere that
13 specifically said patent litigation is not -- doesn't
14 count; don't worry about patent litigation.

09:50:00 15 The problem, and I get that -- I get what
16 you're saying, right? Where you're sitting is, "Who
17 knows how many productions we've had in the past however
18 many years. Now we have to go back through them all?" I
19 get that.

09:50:19 20 There are some, though, that you can
21 probably think, "Yeah, this one we should probably look
22 at" and some that you can think, "It's probably not going
23 to be an issue."

24 I mean, so you're going to have to do
09:50:28 25 triage. You're going to have to look at the ones that

1 are most likely to be at issue in this case.

2 I think you do need to create a list for
3 the plaintiffs, as the Judge has suggested, both of you,
4 and that shouldn't take too long, right? I mean,
09:50:41 5 obviously it's going to take longer to produce documents
6 than to create lists, and so you should do that quickly.

7 Part of the DR-22 analysis, in fact a lot
8 of the DR-22 analysis was you've already produced it;
9 it's not much of a burden to reproduce. It's not like
09:50:58 10 you're going back and finding documents.

11 And so when you say that, "Chicago has a
12 lot of documents that we don't even think are relevant,"
13 well, plaintiffs probably disagree to some extent.

14 And it's the fact that you are reproducing
09:51:11 15 documents already produced that makes it actually easier
16 to just give all of Chicago over instead of going through
17 it and figuring out which -- it's actually more
18 burdensome to go through Chicago and figure out, "Well,
19 which are the opioid-related documents? And then we'll
09:51:26 20 get into arguments over what those are with plaintiffs."

21 It's easier just to give them all over.

22 So I'm kind of riffing on what you're
23 saying, but I do understand that that creates a tricky
24 thing for defendants. And so my suggestion, the way to
09:51:41 25 come at that is just to be realistic and look at those

1 prior productions that you've made that are more likely
2 to have something, some documents in them that are
3 opioid-related and some that aren't.

4 MR. HATCHETT: Yeah.

09:51:57 5 And that's helpful, you know, with respect
6 to identifying investigations.

7 I would say that with respect to the three
8 Motley Rice investigations, those are not investigations
9 that prior to the Court's order or that even the
09:52:09 10 disqualification fight we would have identified.

11 It was not until, I mean, candidly, there
12 was a declaration that was put in in connection with that
13 disqualification motion that basically said, "There were
14 no opioid documents that were included in those
09:52:22 15 investigations." That was the PEC's declaration; a
16 Motley Rice attorney said that.

17 And so then we said, "Is that true?"

18 So then we started looking through the
19 contents of those investigations, and only because they
09:52:34 20 said there were no opioid documents in there did we look
21 and find out, oh, in fact, there were a bunch of opioid
22 documents in the investigations.

23 And so that's -- I think when I talk about
24 the burden, one of the difficulties is there's a burden
09:52:47 25 of the reproduction side, but there's also a burden on

1 the identification side.

2 And so if it is, in fact, requiring us to
3 go through the production files of a bunch of litigations
4 that we wouldn't have otherwise listed because on their
09:53:00 5 face they don't relate to opioid-related issues, that
6 becomes an enormous burden.

7 And what I hear from this Special Master
8 this morning or from you this morning is that we can take
9 a realistic approach to this, and so if at first glance
09:53:16 10 we look at it and we don't have the reason to believe
11 that there's going to be opioid documents related to a
12 patent case or a tax case or some other unrelated
13 litigation, that we don't have a burden to go through and
14 analyze the production files, to pull out opioid-related
09:53:30 15 documents.

16 But our objection isn't just burden. I
17 mean, so when we talk about the City of Chicago, I would
18 say of the three investigations that we identified, it
19 was the most attenuated as it relates to opioids.

09:53:41 20 So the real issue came from a set of
21 documents that were first produced to the Minnesota
22 Attorney General in an insulin-related investigation.
23 Those were reproduced in Hawaii, reproduced in D.C.
24 Actually, I don't believe they were reproduced in
09:53:57 25 Chicago.

1 And so now in Chicago we're actually
2 producing -- we're going to be producing several thousand
3 documents, literally none of which I believe are relevant
4 to any issue in this case.

09:54:06 5 And so it becomes not just a burden issue,
6 it becomes a relevance concern. And so we are concerned
7 that the Court's order has required us to produce, by
8 drawing in litigations that are not facially about
9 opioids, a large volume of documents that truly are
09:54:24 10 irrelevant.

13 SPECIAL MASTER COHEN: You get to bury them
14 with documents that they're going to have to go through
09:54:32 15 and find nothing, so that's --

16 MR. HATCHETT: Well, you can understand
17 that a defendant dealing with --

18 SPECIAL MASTER COHEN: I've got you.

19 MR. HATCHETT: -- you know, class action
09:54:39 20 plaintiffs' attorneys is not eager to turn over a bunch
21 of documents --

22 | SPECIAL MASTER COHEN: No.

23 MR. HATCHETT: -- that are unrelated to the
24 issues that are cited or identified in their complaint.

09:54:46 25 But that's where we are. I don't believe

1 that there's a live issue for Your Honor to resolve. We
2 have very serious reservations about the order, but we
3 are going to comply with it.

4 SPECIAL MASTER COHEN: I appreciate that.

09:54:56 5 Thank you.

6 MR. FARRELL: Can the PEC respond? We have
7 a couple things to say about this.

8 SPECIAL MASTER COHEN: Very briefly, only
9 because we have a lot to talk about, and this is one of
09:55:04 10 the things that there's nothing for me to resolve.

11 MR. FARRELL: No, based on the statements,
12 there is something for you to resolve.

14 MR. FARRELL: So, number one, I'm not going
09:55:14 15 to get into the rhetoric of the Motley Rice
16 investigations or the other language that has triggered
17 animosity between the sides.

18 We're not asking them to produce irrelevant
19 information. What we're asking them to do is to comply
09:55:30 20 with your orders, and that is for them, the obligation is
21 on them to identify investigations, hearings, deposition
22 transcripts, pleadings, discovery, that relate to what
23 we're doing here today, so that this, this entity, this
24 MDL serves as the document repository.

That is an order that we want you to

1 enforce and tell them they need to identify. This isn't
2 go fish where we go and say, "Hey, we found an opioid
3 overutilization hearing in Congress that you didn't tell
4 us about."

09:56:10 5 So I get it when there's patent and
6 peripheral information, but when these set of defendants
7 receive inquiries from the United States Senate on opioid
8 overutilization, that is something that should have been
9 disclosed up front.

09:56:27 10 So, number one, is we're asking you to
11 enforce the portion of the order that the obligation is
12 on the defendants to produce a list of those
13 investigations that they believe are related to or comply
14 with the DR-22.

09:56:46 15 That's number one.

16 SPECIAL MASTER COHEN: Right, which I think
17 I just did.

18 Go ahead.

19 MR. FARRELL: Then number two is that we
09:56:52 20 also want this to apply to all of the Optum defendants.

21 So part of the, I believe, Express Scripts
22 has acknowledged that it will be responding on behalf of
23 DR-22 on behalf of all of its corporate defendants named
24 in this case.

09:57:09 25 I do not believe we're there yet with

1 Optum.

2 MR. HATCHETT: At this time we're not aware
3 of any for the other nine defendants.

4 I mean, nine of them just responded to
09:57:23 5 discovery for the first time seven days ago, and so for
6 those I'm not currently aware of anything that would be
7 subject to DR-22.

8 We will -- we will continue to review it.

9 With respect to the -- one thing I do want
09:57:33 10 to clarify.

11 With respect to the Motley Rice
12 investigations, I said we're complying with the Court's
13 order.

14 One of the things I think we clarified in
09:57:40 15 our e-mail is that they have requested those documents
16 independent through discovery requests, and so I think
17 technically we would say that we were providing them in
18 the context of those discovery requests as opposed to the
19 Court's order.

20 It's kind of a wash either way, but for
21 purposes of preserving the objection.

22 SPECIAL MASTER COHEN: As long as they end
23 up in the repository.

24 MR. HATCHETT: Understood.

09:57:58 25 SPECIAL MASTER COHEN: So, I mean, look,

1 the Judge has tried to be very clear.

2 I think you understand the obligation.

3 I get that the plaintiffs

4 are -- have -- are sensitive about it. Ultimately, if
09:58:08 5 there is something that's in the heartland that you don't
6 list and produce, then you're going to get spanked. So I
7 think I'm not going to worry about it because I think you
8 understand that.

9 I think that's all I need to say at this

09:58:21 10 point.

11 Okay. All right. Let's go to the next
12 issue. I want to talk about, for about a
13 minute-and-a-half, what is Agenda Item 347, that is the
14 defendants' failure to comply with the Facts Sheet order.

09:58:39 15 The reason I'm bringing this up next is
16 because, like DR-22, I don't think there's anything for
17 me to resolve.

18 My reading of the parties' submissions is
19 that you all are doing what you're supposed to do, and
09:58:51 20 maybe there's a little bit of an argument about when you
21 started and when you're going to finish, but I don't
22 think there's anything for me to say except that you need
23 to do what you have said you're going to do and are in
24 the process of doing.

09:59:03 25 Is there anything more that I need to say

1 about that?

2 Okay. All right.

3 MR. BADALA: I'm sorry, Special Master

4 Cohen, I wanted to make just one point about it.

09:59:16 5 One thing that we're looking for
6 clarification is defendants responded that they're going
7 to abide by the order and actually submit a Fact Sheet,
8 which they haven't.

9 But which defendants will they be
09:59:27 10 submitting Fact Sheets for? Will they be submitting
11 Optum for all of the parties, and then an Express Scripts
12 for all of the parties, or will they submit for each one
13 of the parties that's in this litigation?

14 MR. COOPER: Your Honor, Jonathan Cooper
09:59:41 15 for Express Scripts.

16 We're putting together the full defendant
17 Fact Sheet for all of the Express Scripts defendants in
18 these cases.

19 MR. HARDER: Brad Harder for the Optum
09:59:54 20 defendants.

21 We're doing the same for all of the
22 entities listed in your letter, Sal.

23 MR. BADALA: Thank you.

24 MR. FARRELL: That was Sal Badala on behalf
10:00:07 25 of the plaintiffs.

1 SPECIAL MASTER COHEN: Okay. The next one
2 I want to address is Agenda Item 343. This is the scope
3 of the opioid drugs to be produced.

4 And, you know, the essential argument, as I
5 read it, is what I call the MDL-8 versus also the
6 additional three, the additional three being codeine,
7 Tramadol and Buprenorphine.

8 So I think I want to start with plaintiffs.
9
0 And I don't know who's going to talk about this one, but
1 so in your letter you explain how there are documents
2 which I looked at that talk about, for example, Tramadol
3 and you assert/suggest that those documents show that the
4 PBMs knew that Tramadol was a drug that there was an
5 issue about; that they had internal rules about making
6 sure that Tramadol was looked at carefully, red flagged
7 and so on, but that they didn't do it and, therefore,
8 that that is relevant to your case.

18 And so they should -- "they," the
19 PBM -- should produce documents that have to do with
20 Tramadol. Same to some extent with codeine. Same to
21 some extent with Buprenorphine.

22 The PBMs respond that, "We've done the
23 MDL-8 from the beginning. There were attempts by
24 plaintiffs earlier to add other drugs, which the Court
25 said no to, and that the burden of producing those

1 additional three drug documents and data is high and
2 isn't worth the -- the squeeze isn't worth the juice.
3 And moreover, it would require a lot more third party
4 discovery of defendants who have already settled:
10:02:17 5 Manufacturers, pharmacies and distributors."

6 And so I have a few questions.

7 One is the plaintiffs did not respond, that
8 I saw, in any way to the assertion by the PBMs that it
9 would -- it would thus require third party discovery.

10:02:38 10 You never touched on it, and that goes to
11 burden.

12 At the same time besides that kind of
13 simple description, we're going to have to do third party
14 discovery on these other guys. I don't really know what
15 that means or why you would have to do it, so that's part
16 of what I want to hear and anything else you want to add.

17 Obviously I've read it. You don't need to
18 repeat things that I've read, but I would like to hear
19 your positions.

10:03:05 20 MR. IRPINO: Yeah, I didn't
21 understand -- Anthony Irpino for PEC.

22 I didn't understand why third party
23 discovery was required, but I think as a more basic issue
24 is we were addressing, and have been addressing, the data
10:03:23 25 and pulling the data and running those searches.

1 So when we had the meet and confer, it was,
2 hey, just tell us what is the burden to pull the data for
3 these three additional drugs. And there was nothing, no
4 burden.

10:03:42 5 Then it gets bootstrapped onto, "Well, if
6 we run data for these document -- for these other drugs,
7 then it's going to be all these other documents."

8 And we never even got to that point from
9 our perspective. We were just focused on the data. It's
10:04:01 10 data that gets run within these entities for purposes of,
11 you can call it, CDUR or Current Drug Utilization Review
12 as part of point of sale, as part of their programs that
13 they run for these pharmacies, to say, "Hey, look, you've
14 got Tramadol in here, you've got Buprenorphine combined
15 with this."

16 So that's where we were coming from on it.
17 And quite candidly, we thought we spelled it out fairly
18 well in terms of the various documents. And we've got
19 plenty of others, if you need, to address the fact that
20 they actually used this in practice.

21 So from our perspective, they made this
22 data relevant as part of their practices, and so that's
23 where we're coming from on that.

24 SPECIAL MASTER COHEN: Well, except that
25 it's not going to stop at data. It's clearly going to --

1 you're not going to just want data on those three
2 additional drugs, you're going to want documents as to
3 those three as well.

4 In fact, you've cited them in your letters.
10:05:03 5 And so to the extent you want to make your case when it
6 comes time to a jury that part of what they didn't do are
7 Tramadol reviews, you're going to need documents.

8 And so let's get to documents. They're
9 saying that that's going to increase the burden and get
10:05:19 10 to, you know, into third parties.

11 So what about that?

12 MR. IRPINO: Well, I still to this day
13 don't understand the third party and why that's going to
14 involve third parties, and it just has never been
10:05:31 15 explained, as best I can understand it, and it certainly
16 was never a topic on our meet and confer.

17 But aside from that, then -- I still
18 haven't heard even with respect to documents, "Well, how
19 many additional hits are you getting, what are we talking
10:05:46 20 about, what's the scope," if we're going to go to
21 documents.

22 I mean, data is an important component of
23 it. And our experts can review that data and be able to
24 opine on it, but if we go to the document aspect of it, I
10:05:59 25 haven't heard anything, I haven't seen any specifics as

1 to that burden, and I don't know what it is.

2 SPECIAL MASTER COHEN: Okay. Let's have
3 defendants try and explain to you.

4 MR. WASSERMAN: This is Matthew Wasserman
10:06:15 5 for Express Scripts.

6 SPECIAL MASTER COHEN: Could you pull the
7 mic a little closer?

8 MR. WASSERMAN: Matthew Wasserman for
9 Express Scripts.

10:06:23 10 To your question, Special Master Cohen,
11 about what third party discovery we might need to take,
12 if the plaintiffs' theory here is that the marketing, the
13 distribution of these three drugs led to an opioid
14 crisis, there right now in the record is no evidence, no
10:06:40 15 discovery about how these drugs were marketed,
16 distributed or dispensed because none of the prior
17 defendants had these drugs as in scope.

18 So if the PBM defendants need to defend
19 themselves and say why we weren't responsible for the
10:06:55 20 marketing, why we weren't responsible for the
21 distribution, we would have to go back to those
22 defendants and understand how were they marketing and
23 dispensing these drugs.

24 Same is true with third parties. The DEA,
10:07:11 25 for a couple of these drugs, didn't Schedule them until

1 later in time. Codeine was available over the counter
2 until 2018. That's all going to require discovery about
3 why DEA chose to do what it did, and then how the
4 manufacturers and the distributors responded.

10:07:30 5 Same is true for prescribers. There's no
6 evidence in the record, no discovery thus far on the
7 prescribing habits surrounding these three drugs.

8 So we were just talking about DR-22 and the
9 efficiencies gained. Well, the efficiencies gained of an
10:07:50 10 MDL and having this pot of discovery to rely on doesn't
11 exist here. There is no discovery on these three drugs.

12 And if the PBMs are going to be blamed for
13 an opioid crisis as it relates to these three drugs, we
14 think we need -- we might need discovery from other
10:08:09 15 defendants and other third parties.

16 MR. HATCHETT: Your Honor, this is Andrew
17 Hatchett for the Optum defendants.

18 I agree with everything that Mr. Wasserman
19 said. In terms of individual burden, you know, data, of
20 course, as you pointed out, does eventually lead to
21 documents and it goes from there.

22 At this point in the discovery negotiations
23 we've proposed 39 custodians.

24 We don't have all our data ready to run
10:08:39 25 search inquiries to figure out exactly how many documents

1 are going to hit on these products. The plaintiffs have
2 sent back a list of 81 additional custodians they would
3 like us to consider adding. I don't know what number we
4 are going to land on, but it's going to be, you know,
10:08:52 5 several dozen custodians in the case.

6 I don't know what the numbers will look
7 like when they map out. We can obviously get to that at
8 some point. We're not there and able to document that
9 burden.

10:09:01 10 But the notion that there will be limited
11 or no burden is going to be plainly false. I think we
12 will see that when we get into the documents and start
13 applying, if we were forced to apply these sort of search
14 terms to that broad range of documents.

10:09:19 15 MR. WASSERMAN: Special Master Cohen, if I
16 could add one more thing. This is Matt Wasserman again.

17 The idea that because the PBMs were
18 discussing the risks associated with these drugs in their
19 documents thereby makes them relevant is a false premise.

10:09:35 20 First off --

21 SPECIAL MASTER COHEN: It makes them
22 discoverable; maybe not relevant.

23 MR. WASSERMAN: Well, it could apply to any
24 defendant and any drug.

10:09:43 25 In fact, the PEC has cited previously

1 documents internally that the pharmacies had discussing
2 different drugs.

3 That didn't open the MDL-8 and expand it.

4 And they had these documents before they
10:10:01 5 filed their 300-page amended complaint, and they don't
6 mention codeine at all. They don't mention Tramadol at
7 all.

8 They cite tons of documents, Purdue
9 documents. They cite our own documents that we've
10:10:16 10 produced in the Jefferson County litigation.

11 They didn't put that in their 300 pages of
12 amended complaint, so we think it's -- it doesn't make it
13 relevant or even entitled to discovery because they
14 didn't allege in their complaint that these three drugs,
10:10:36 15 that we were a substantial contributor to an opioid
16 crisis because of these three drugs.

17 SPECIAL MASTER COHEN: Yeah, I'm not sure
18 that mentioning it explicitly in a complaint is what
19 decides this.

20 So, Anthony, here's what concerns me about
21 the additional three.

22 So codeine is a Schedule II. Tramadol is a
23 Schedule III. Codeine was over the counter for quite a
24 long time. That's different from the MDL-8.

25 Then you've got Buprenorphine. I don't

1 even know what Schedule it is. I think it's not a
2 Schedule II, but it's a rescue drug, and so the fact
3 that, as mentioned in your -- in somebody's letter, the
4 plaintiffs' letter, the Buprenorphine prescription rates
10:11:43 5 skyrocketed is probably because it's being prescribed as
6 a treatment, as a rescue drug.

7 And so you get to trial and now you've got
8 to explain codeine, which is making things that are
9 really complex even more complex. You have to explain
10:12:00 10 Tramadol. You have to explain Buprenorphine. It makes
11 it more difficult. And here's the kicker: I doubt that
12 it's going to make a difference in whether you prove your
13 case.

14 You're either going to win or lose on the
10:12:15 15 MDL-8, and the addition of that other data is hard for me
16 to believe that that's going to change, change what
17 happens.

18 MR. IRPINO: Well, I don't disagree that
19 certainly the MDL-8 is highly relevant.

20 What I would say is in terms of the data,
21 it informs a significant amount as to volume and
22 location.

23 And so as we spelled out in the briefs or
24 letters, some of these drugs, Special Master, I mean
10:12:53 25 Tramadol in terms of volume, in each of the Bellwether

1 counties, is a top three narcotic.

2 I mean, we didn't make up these numbers. I
3 mean, that -- those are what the numbers are.

4 And so we also didn't just randomly select
10:13:10 5 these drugs. There was rhyme and reason behind it.

6 The rhyme and reason both stem from
7 defendants' documents and how they were tracking these
8 drugs and how they were treating these drugs, as well as
9 the numbers with respect to those drugs.

10:13:25 10 So that's why a lot of our focus was on the
11 data. At least give us the data so our experts can at
12 least analyze that and talk about these drugs in the
13 context of the epidemic.

14 MR. WASSERMAN: Special Master Cohen, if I
10:13:43 15 can respond to that.

16 This is Matt Wasserman again.

17 So on the volume point, I think there's a
18 conflict between what the plaintiffs allege in their
19 complaint and what they're saying now.

10:13:53 20 In their complaint, they're alleging that
21 the PBMs sort of forced people to take more addictive
22 opioids and made it harder to go to less addictive
23 alternatives.

24 So the fact now that the PEC wants to cite
10:14:09 25 the fact that these three Schedule III or IV drugs which

1 the DEA says are -- have a lower potential for abuse,
2 have a lower risk of dependence, the fact that they were
3 becoming more prescribed in the 2015 to 2019 period,
4 which is where the PEC pulls this data from from ARCOS,
10:14:30 5 actually runs counter to their allegation that the PBMs
6 were targeting more addictive drugs and sending people
7 there.

8 And then on the second point for the data
9 being very important, when you look at something like
10:14:44 10 codeine, which was available over the counter until 2018,
11 people were not going to the pharmacy and running codeine
12 prescriptions through their pharmacy benefit. They were
13 going to the shelf and taking it off the shelf.

14 SPECIAL MASTER COHEN: Codeine is off the
10:15:04 15 table. That's for sure not going to happen.

16 MR. WASSERMAN: Okay.

17 So for Buprenorphine, exactly to your
18 point -- and again it goes along with volume -- the PEC
19 cites the fact that Buprenorphine prescriptions have gone
10:15:17 20 up a lot in the last few years.

21 Well, that's because it's a medication
22 drug. It's a drug to help people with opioid use
23 disorder.

24 And Tramadol, a Schedule IV drug which the
10:15:33 25 DEA says has a low potential for abuse, if those

1 prescriptions are also going up, it's the same, same
2 reasoning applies, that people are potentially leaving
3 the more addictive Schedule II drugs and going to the
4 less addictive Schedule IIIIs or IVs.

10:15:51 5 So we don't think that the plaintiffs can
6 have it both ways with the allegations in their complaint
7 that the PBMs are driving people to more addictive
8 opioids, but then cite the fact that less addictive
9 opioid prescriptions are going up.

10:16:17 10 SPECIAL MASTER COHEN: One second, please.

11 Tramadol is a Schedule III, isn't it?

12 MR. WASSERMAN: Tramadol, I believe, is
13 Schedule IV.

14 SPECIAL MASTER COHEN: I believe Tramadol
10:16:43 15 is III and Buprenorphine is IV, or maybe I'm wrong?

16 MR. WASSERMAN: I think they are switched.

17 SPECIAL MASTER COHEN: Thank you.

18 MR. WASSERMAN: And just to the point
19 about, you know, the similarity between codeine and
10:16:54 20 Buprenorphine, I believe you already considered
21 Buprenorphine in your January 27th, 2020 discovery
22 ruling. That was with the pharmacies.

23 But you have the same thing where it was
24 introduced decades ago, codeine and Buprenorphine, in the
10:17:09 25 late 1960s, so if the plaintiffs are alleging an opioid

1 crisis that began in the '90s, you're now talking about a
2 drug that had been on the market for 30 years prior to
3 that.

4 SPECIAL MASTER COHEN: Mr. Irpino.

10:17:26 5 MR. IRPINO: Just here to answer questions.

6 I think we've put in our briefs and I think
7 we've established why this is important, but I think
8 particularly for Tramadol. And that's --

9 SPECIAL MASTER COHEN: So I guess I should
10 explain something procedural at this juncture which is
11 that if you go back and look at my appointment order, it
12 says that, you know, there are different ways that I
13 could rule.

14 One of them is informally, and then if
15 somebody doesn't like it they can ask for me to formalize
16 that, which I've done many times in writing.

17 The other thing it says, though, is -- and
18 I haven't done it very often -- is that I can rule on the
19 record and that stands as the ruling, and so if somebody
20 doesn't like it and they want to file an objection, it's
21 the ruling in front of the court reporter that serves as
22 the ruling to be objected to.

23 And so I just want to let you know that
24 that's what's happening here today.

10:18:17 25 That any rulings I do make on the record

1 are ones that, if you don't like, you would object to
2 that and not to something later that I put out in
3 writing, unless I do add something in writing later.

4 So the ruling that I'm issuing right now on
5 this is that I am concluding that the additional three
6 data is not going to be produced. I think that the
7 burden does exceed the benefit in this case.

I think that it's going to lead to,
frankly, confusion at trial. I think that especially
with respect to Buprenorphine and codeine, that it makes
very little sense for that additional data.

12 The Tramadol, frankly, was one that I
13 waffled on, but I do think that because it is a Schedule
14 IV or a Schedule III drug, actually doesn't matter, and
15 not a Schedule II like all of the rest of the MDL-8
16 drugs, and also that I just really do not believe that
17 the additional data of Tramadol in particular is going to
18 make any difference on whether plaintiffs prevail or
19 defendants prevail in this MDL, that that kind of
20 clinches it for me.

21 Not to mention the third party discovery.
22 And I do believe that the necessity of third party
23 discovery does go to the measure of burden under Federal
24 Rule of Civil Procedure 26(b) (1).

So I'm going to rule in favor of the PBMs

1 with regard to the scope of the opioid drugs.

2 At docket -- I'm actually not sure where
3 the plaintiffs wrote it, but in one of their submissions
4 here's what the plaintiffs write, and I'm quoting.

10:20:11 5 "Defendants have agreed to produce
6 transactional data including claims data, rebate data,
7 administrative fee data and dispensing data from its
8 mail-order pharmacies for eight opioid drugs" -- then
9 they list them -- "and for the 14 Benzodiazepines and
10:20:29 10 four muscle relaxers included in Exhibit B to docket
11 3106."

12 That's all that's required.

13 Okay.

14 All right. Next one I want to touch on is
10:20:49 15 Agenda Item Number 342, which is the geographic scope of
16 CMO data to be produced.

17 And in this one, part of what makes it
18 difficult is that, as I just mentioned, there are
19 different data sets, right? We've got claims data, we've
10:21:09 20 got rebate data, we've got administrative fee data -- I'm
21 not even sure I understand fully what that is -- and then
22 mail-order dispensing data.

23 And the letters the parties have traded
24 suggest that PBMs are trying to parse that; that the
10:21:30 25 plaintiffs want all the data for all of the states, all

1 of those different kinds of data for all of the three
2 states that are at issue, and the PBMs come back and say,
3 "Well, as to certain kinds of data, we're willing to do
4 this, and for certain kinds of other data, we're willing
10:21:47 5 to do that."

6 And to be honest with you, keeping all of
7 that in my head has not been easy, and so I'm not sure
8 that it's in there.

9 Let me start with what I think we do need
10:21:59 10 to do, and that is that I think that for Missouri it's
11 going to be statewide. We've got two different counties
12 or plaintiffs, one's a city I think, but we've got two
13 different counties and also a State Court case, and so
14 Missouri is going to be statewide.

10:22:20 15 My inclination, but I haven't quite decided
16 it yet, is that will be true as to all data, all of those
17 different kinds, and then I have some ideas what to do
18 with Rochester, New York and Webb County, Texas.

19 But first, I want to hear some explanation
10:22:44 20 from defendants why it shouldn't be statewide; if it
21 shouldn't be statewide, what it should be; and if you
22 want to parse out different kinds of data, you can
23 explain that to me, too.

24 The one thing I'll mention, though, is, in
10:23:02 25 fact, let me just start with this clarification question

1 from the plaintiffs.

2 One of the things that the plaintiffs have
3 said is the reason we need this data is because we have a
4 red flag analysis that is a 25-mile radius. And so we
10:23:18 5 need data at the very least, dispensing data and maybe
6 other kinds of data, that is within 25 miles of, let's
7 say, the borders of the counties at issue, whatever that
8 means.

9 Why do you need anything more than that?

10:23:35 10 Why do you need anything more than 25 miles?

11 MR. MOUGEY: This is Peter Mougey for the
12 PEC.

13 We have repeatedly demonstrated the
14 numerous examples when we are looking at a city or a
10:23:51 15 county in a specific state where a resident lives that is
16 driving either across state lines or to the other end of
17 the state for a prescription, and then driving to
18 the -- an opposite side of the state to get that
19 prescription filled.

20 And if we go back to your initial order --
21 forgive me for the rabbit trail for a second, but I find
22 it interesting that defendants are relying on prior
23 orders when it suits them, and now here we are where
24 there's an example where they don't want to comply with
10:24:25 25 the prior orders which are statewide.

1 And the evidence has come in repeatedly in
2 trial and trial after trial that individuals are filling
3 scripts that were generated all over the state, and then
4 are getting scripts and then filling scripts sometimes
10:24:42 5 hundreds of miles away.

6 And by limiting the data to just the
7 contiguous counties, you lose all of the examples of
8 those individuals filling those scripts. All you have is
9 the surrounding counties.

10:24:59 10 So, yes, you're right, 25 miles, if it
11 exceeds 25 miles, but the most egregious is what happens
12 if they are 200 miles away?

13 And so you limited us, because we made the
14 point that if a city or county is on the edge of a border
10:25:15 15 on a state, that they could drive over to the other state
16 just as easy, that you said, "No, we're going to stick to
17 the state."

18 That model has limited us and balanced the
19 burden argument, but keeping within the state allows us
10:25:30 20 to give the examples to the Court and the jury of those
21 egregious examples where they are hundreds of miles away.

22 SPECIAL MASTER COHEN: So my recollection
23 at trial, though, is that there were maybe, you know, the
24 occasional example of something like what you said where
10:25:47 25 somebody went to Florida, you know, hundreds of miles

1 away but the red flag analysis was a 25-mile analysis and
2 that was the heart of your claim.

3 MR. MOUGEY: It was no -- it was 25 miles
4 or more.

10:25:58 5 And I've tried two cases and there
6 were -- there were a tremendous number, more than one or
7 two numbers of examples. We had examples that were
8 entered into evidence where they drove across the
9 state -- I'm sorry -- all the way from one end of the
10 state to the other to get a script, and then drove a few
11 more hours out of the way to get the scripts filled.

12 And so these have been important examples
13 in trying the case because they're the most egregious.
14 If you kind of look at this as a heat map and code the
10:26:32 15 pink to red, red being the most egregious examples,
16 running just the contiguous, the data from just the
17 contiguous counties, you lose the reddest of the red, you
18 lose the worst and most egregious examples that there is
19 no plausible explanation for a patient driving that far
10:26:50 20 to get a script and then driving a few hours out of the
21 way on the return home to fill the script and then
22 returning back to their hometown.

23 So it's more than 25 miles.

24 So by just confining, which I'm confident
10:27:00 25 is what the defendants are trying to do, they're taking

1 away the hottest of the hot; not the ones that I was
2 going to work and I just happened to go out of my way to
3 get the -- when I was at work and get the script filled.
4 You're talking about driving all the way across the
10:27:16 5 state.

6 So these have been important pieces in the
7 cases that we've tried. These are your prior orders, and
8 that it's statewide. We still don't -- we lose the
9 example of someone going across state lines, but that was
10:27:28 10 the -- that was the burden balance argument.

11 I would like to remind you how many times
12 we've heard the burden argument from the beginning, and
13 how difficult it was to pull these, the rest of the data.
14 And I know you've heard me make this argument before, but
10:27:46 15 if you're pulling data for five counties in a state,
16 what's the difference with pulling it for 15 or 20?

17 And we've heard the defendants argue that
18 that just isn't right, that it doesn't scale.

19 It does scale. And, quite frankly, we've
20 heard how voluminous the state is and how difficult it is
21 to pull, and then lo and behold come to find out it's
22 produced on a hard drive that we get at Lowe's -- not
23 Lowe's; at whatever -- Circuit City, and we load it into
24 our databases, go have dinner and come back, and it's
10:28:19 25 loaded.

1 I mean, these are not, these are not data
2 sets that burden should be a material piece of your
3 decision making. These are scalable decisions, data
4 pulls. Pulling them from five counties to the entire
10:28:34 5 state does not make a material difference on the burden,
6 and it is a very important part of the hottest of the hot
7 red flags and the example is more than 25 miles.

8 SPECIAL MASTER COHEN: Would you
9 trade -- would you trade, let's say, double contiguous
10:28:53 10 counties, you know, the contiguous counties and those
11 that are contiguous to those in the neighboring state?

12 Would you take that?

13 MR. MOUGEY: I'd have to look at a map and
14 see where each of these, each of these cities or counties
10:29:09 15 that are Bellwethers, and I think the answer, I think the
16 answer would be no, and that we'd like to stick within
17 the state, because that brings different PDMP data into
18 effect, and I think it would complicate.

19 My suggestion is this is a recipe that's
20 worked, and it's -- you've already balanced this issue.
21 There was subsequent motions filed on this, on this
22 issue.

23 You heard argument on multiple times, and
24 requests for reconsideration, and this was the balance
10:29:42 25 you struck, which is just the state.

1 It's worked and it's been an important part
2 of the evidentiary process in the cases and, quite
3 frankly, I think the results, because a lot of the
4 results are eye-popping and they're powerful, they're
10:29:58 5 extremely powerful with these examples.

6 And I understand why the defendants don't
7 want the Court or juries or the fact finder to see this,
8 but these are extremely powerful examples of -- these
9 should have popped like a -- like a compliance Christmas
10:30:14 10 tree.

11 MR. WEINBERGER: Can I just add something?
12 Do you mind, Peter?

13 MR. MOUGEY: Of course not.
14 MR. WEINBERGER: Special Master Cohen,
10:30:22 15 Peter Weinberger.

16 The other thing that's different about
17 these defendants, then, the manufacturers and
18 distributors and even the pharmacies until late in the
19 discovery phase on the pharmacy side is that these
20 defendants, going back 30 years in their documents, have
21 touted the fact that they are data rich and that the
22 decisions that they make and recommend in the wide
23 variety of screening drugs and putting drugs on formulary
24 lists and the like and predicting trends is based upon
10:31:04 25 the fact that they are data rich.

1 And not only are they data rich, but they
2 provide their data and sell their data as well as
3 promoting the fact that their decision-making is based
4 upon data.

10:31:22 5 And so for them, for -- and it's all over
6 their contracts. It's all over their rebate contracts.
7 It's all over their PowerPoints. It's all over their
8 online promotional materials.

9 And so for them to suggest now that there's
10 some significant burden as opposed to being able to, you
11 know, hit a couple buttons, turn on their algorithms and
12 produce these, this data, I would submit to you -- and
13 we're not -- we're not making the argument here -- this
14 is -- this is a set of defendants where, despite what the
10:32:00 15 Sixth Circuit may have said, we should be getting
16 nationwide data from them, but we're not there yet at
17 this point.

18 But certainly with respect to statewide
19 data, I can't believe that any factfinder would find this
10:32:16 20 to be burdensome based upon how they promote the way they
21 do business.

22 MR. MOUGEY: May I, just to finish?

23 We asked for nationwide data before, and we
24 felt the baselines were extremely important and when
10:32:31 25 comparing specific Bellwethers to other Bellwethers. And

one of the reasons why we settled on that particular,
just the state and pursuant to your order, was that we
could at least establish a baseline within the state.

4 But the point Pete's making is exactly
5 correct, and that different than the dispensers, the
6 manufacturers and the distributors is the marketing pitch
7 from the PBMs.

13 So I believe it's disingenuous to walk in
14 front of the Court and now say it's burdensome when their
15 business model is harvesting, pulling and producing data.

16 And we're now getting just a little glimpse
17 behind the curtain, that we're looking at the Purdue docs
18 and just a little more specific as to what Pete alluded
19 to is that the contracts are replete with, "We are data
20 businesses. We gather the data. We organize the data.

21 And we sell the data, and we help you position your drugs
22 based on our data analysis."

23 So to now say this is burdensome to pull
24 is -- I just -- it's disingenuous.

At least the statewide data is where I

1 think we start. My guess is, as Pete indicated, there
2 might be a time where we come back to the Court where
3 we're going to look at expanding that, but it would be an
4 absolute travesty at this point to narrow your prior
10:34:18 5 order anything less than statewide for a number of
6 reasons.

7 SPECIAL MASTER COHEN: Okay. Why don't I
8 hear from the defendants?

9 And I will add that I don't know if you're
10:34:27 10 familiar with history, but the data production was
11 originally ordered nationally; then went to regional; and
12 then ended up at state.

13 And so essentially you're arguing for a
14 much narrower provision than what the Court originally
10:34:44 15 had thought. I just wanted to let you know the history.

16 MR. WASSERMAN: That's right.

17 This is Matthew Wasserman for Express
18 Scripts.

19 I'll go through the three points that I
10:34:54 20 think the plaintiffs raised.

21 First, starting with them losing the worst
22 examples; second, we've heard this all before, it's been
23 decided before; and third, the burden.

24 So on the losing the examples, I think it's
10:35:08 25 a proportionality argument. It's a burden versus

1 benefit. And I just want to give a couple hypothetical
2 examples.

3 You're talking about City of Rochester, New
4 York with a population of 210,000 people. You
10:35:24 5 want -- the plaintiffs want to find the person who
6 traveled from Rochester throughout the State of New York.

7 Well, you talk about New York City with a
8 population of eight-and-a-half million people so you have
9 hundreds of thousands, if not millions of additional
10:35:39 10 claims that would have to be produced to potentially find
11 that one, two, three people who traveled -- I was doing a
12 lot of Google mapping this morning -- 340 miles or
13 five-and-a-half hours.

14 And of course, it could also capture
10:35:59 15 legitimate travel, people who need to go to hospital
16 systems or specialists in the city to, you know, obtain
17 treatment.

18 Webb County is maybe even more egregious
19 because Texas is even a larger state. Webb County has a
20 population under 300,000 people. The largest city in
21 Texas, Houston, with a population of 2.2 million people,
22 that's 300 miles away. That's a five-hour drive.

23 To produce all of Texas's data, millions
24 potentially claims, to find the one, two, three examples,
10:36:36 25 we just think the burden there far outweighs the benefit.

1 And when they say this has been all decided
2 before, I think there are three reasons why PBM data is
3 different.

4 PBM data is different than retail pharmacy
10:36:53 5 data because PBMs adjudicate claims for a network of
6 pharmacies. They adjudicate claims for pretty much every
7 retail chain, grocery chain, mom and pop, local chain.

8 So an order here ordering the PBMs to
9 produce statewide data is essentially the equivalent of
10:37:16 10 ordering a single retail pharmacy chain like CVS to not
11 just produce its data for its physical retail locations
12 in that state, but to basically produce data for all of
13 its competitors, too.

14 There are thousands of pharmacies in these
10:37:34 15 states that the PBMs adjudicate claims for. So we put an
16 example of Walmart had about 170 retail stores in Ohio.
17 An order telling Walmart to produce its data for those
18 170 stores is on a completely different order of
19 magnitude for a PBM that adjudicates claims across many
10:37:58 20 retail pharmacies totaling thousands.

21 And then second, I just want to point out
22 that in the Track 1B cases where you were talking Summit
23 and Cuyahoga, you had plaintiffs who represented a large
24 portion of the state's population.

10:38:16 25 SPECIAL MASTER COHEN: Okay. Let me stop

1 you there because you're just lucky that there aren't
2 thousands of cases, and that could be changed by allowing
3 a motion to amend. That would change like that.

4 So you're right, that part of the Court's
10:38:29 5 analysis, when it was addressing data scope, was that
6 there were all of these other cases filed in Ohio and,
7 therefore, it was relevant to those other cases and
8 eventually we're going to need it.

9 That's equally true of PBMs except for a
10:38:47 10 moratorium on filing amended complaints, which the Court
11 has been approached to change.

12 So I'm just telling you I'm not putting a
13 lot of weight on that aspect.

14 MR. WASSERMAN: Understood.

10:38:57 15 I will just say I think it's worth
16 mentioning that these three plaintiffs are much smaller,
17 represent a much smaller population and a much smaller
18 distribution of opioid drugs purchased than Summit and
19 Cuyahoga Counties.

20 I mean, Webb County, a population that is
21 less than one percent of Texas, to then order all of
22 Texas's state production, we think is not proportional.

23 And I just want to hit on the last point
24 about burden, this idea that you just push a button.
10:39:34 25 Express Scripts submitted a declaration from Al DeCarlo,

1 our lead analytics person at Express Scripts. It is not
2 that simple. As you expand the geographic area, that
3 requires more queries to be run, that requires more data
4 to be analyzed, and this stuff takes time.

10:39:53 5 So it is not as simple as just pressing a
6 button.

7 We also are under a CMO deadline to finish
8 producing data in about 11 weeks from today, and
9 Mr. DeCarlo talks about, in his declaration, not only how
10:40:13 10 expanding the temporal scope potentially would require
11 more time, but also how expanding the geographic scope
12 would take more time.

13 MS. McGOWAN: Special Master Cohen, Emily
14 McGowan for OptumRx.

10:40:33 15 You know, Mr. Mougey says we have a recipe
16 that's worked in the past, but we have really a new
17 ingredient here and that is the PBM data.

18 The PBM claims and rebate data is not the
19 same as dispensing data.

20 And to the generalized comments that these
21 are companies that are data rich and can simply press a
22 button and sell data, that is inaccurate with respect to
23 OptumRx. That is not what's happening here.

24 But I want to address something that has
10:41:04 25 not come up and I didn't hear Mr. Mougey or

1 Mr. Weinberger address it, which is really why are PBM
2 data different.

3 Completely agree with what Mr. Wasserman
4 said with respect to the fact that the data will reflect,
10:41:21 5 just in the Bellwether jurisdictions, just in those
6 contiguous counties or the contiguous county, dozens if
7 not well over a hundred unique pharmacy relationships.

8 That's just in the Bellwether
9 jurisdictions.

10:41:33 10 But the really unique thing about PBM data
11 is that it reflects client relationships. PBMs are
12 serving client health plan sponsors, and that could be
13 anything from a local union, a Government entity, a
14 Medicare Advantage Plan, a wide range of clients.

10:41:55 15 And what the data will reflect are the
16 client decisions with respect to formulary plan and
17 design.

18 So unlike pharmacies where I can see a
19 theoretical argument that differences in how individual
10:42:10 20 pharmacies within a state dispensed a drug might matter
21 and might be worth looking at, that's really not the case
22 for PBMs.

23 A member who lives in Houston of the same
24 health plan that has a member in Webb County is going to
10:42:26 25 have their opioid claim adjudicated in the same way.

1 There's not going to be a difference because of where
2 they live.

3 And if the case is really about the harm to
4 the Bellwether jurisdictions and the plaintiffs'
10:42:40 5 communities, then the data production should focus on the
6 clients who have concentrations of members who live in
7 those jurisdictions and fill their prescriptions in those
8 jurisdictions.

9 And actually the example that Mr. Mougey
10:42:58 10 offered of the red flags he'd so like to see will be
11 captured in the data.

12 Now, I agree with what Mr. Wasserman said
13 that producing an entire state's worth of data is
14 disproportional to find the one person who drove to
10:43:13 15 Manhattan when they live in Rochester, but if there were
16 people who were driving from Manhattan and filling
17 prescriptions in Rochester, every single one of those
18 would be captured by the data that would be produced for
19 Rochester.

20 And if people are driving from Dallas and
21 Houston down to Webb County to fill opioid prescriptions,
22 it will also capture those trips.

23 So I think those examples that he's
24 suggesting are so important will actually be captured in
10:43:41 25 the offer that we have made.

1 I also want to speak to this client
2 consideration. It has a significant impact on other
3 discovery in this case.

4 So collecting for an entire state is going
10:43:57 5 to -- every single claim that will be produced will have
6 a client associated with it.

7 Just taking the Bellwether jurisdictions --
8 and again, these are rough and preliminary numbers -- but
9 based on our analysis, we're looking at over a thousand
10:44:13 10 unique plan carriers in just the Bellwether jurisdiction
11 and the contiguous counties, and well over a thousand
12 once you get outside of Webb County, which is much
13 smaller than the others.

14 So we have thousands of unique plan
10:44:29 15 carriers, thousands of plan designs before we even expand
16 to the state. That's going to be amplified by many,
17 many, many thousands once we expand to the state, and
18 again then we're just moving further away from the actual
19 people who live in the jurisdictions where the plaintiffs
10:44:46 20 allege they suffered harm.

21 I do want to speak a little bit to
22 proportionality because with respect to New York and
23 Texas it's most significant. And I hear what you've said
24 regarding Missouri, but with respect to Rochester --
10:44:59 25 again just speaking for OptumRx and just looking at very

1 preliminary numbers -- what a statewide ask would seek
2 would be producing data with the case of Rochester where
3 Rochester represents just 3.9 percent of the MDL-8
4 opioids that OptumRx has processed from 2010 to 2019.
10:45:22 5 3.9 percent in Rochester, and they're asking for the
6 entire State of New York, more than 95 percent of the
7 state.

8 In Webb it's even more pronounced, .4
9 percent of the opioid, MDL-8 opioids that OptumRx has
10:45:36 10 processed are associated with Webb County and the
11 contiguous counties, and they're asking for 99.6 percent
12 of the rest of the data, the rest of the state, without
13 showing really any connection between those prescriptions
14 and the harm that they allege they've suffered.

10:45:53 15 And so for those reasons, we think that the
16 production should be tailored under Rule 26 and
17 proportional to the case.

18 SPECIAL MASTER COHEN: Thank you.

19 And I just want to make sure I understood
10:46:08 20 what you just said.

21 Are you saying that especially as to
22 certain data sets; for example, claims and rebates?

23 MS. McGOWAN: Correct. That is our
24 argument with respect to claims and rebate data.

10:46:20 25 For OptumRx, we are taking the position

1 that dispensing data for the home delivery pharmacy would
2 fall under the prior orders, and that we have offered to
3 produce that statewide.

4 PBM claims and rebate data are unique.

10:46:38 5 MR. MOUGHEY: May I respond?

6 SPECIAL MASTER COHEN: Please.

7 MR. MOUGEY: Peter Mougey.

8 SPECIAL MASTER COHEN: And you don't need
9 to say that more than one person went to New York City --
10 I know you're going to say that -- or three.
10:46:46

11 MR. MOUGEY: One of the reasons that we
12 wanted to start on the temporal scope was the
13 overwhelming nature of the documents that we're seeing
14 out of the Purdue production that have not been produced
10:47:05 15 by the defendants but we're seeing in the Purdue
16 production.

17 And I didn't think we would see this kind
18 of production and the type of admissions that we're
19 seeing in that production, again after Purdue was out of
10:47:21 20 this case.

21 And what we're seeing and why this is
22 important to tie this back into the PBMs, this wasn't a
23 Purdue-isolated marketing campaign to reeducate doctors
24 and prescribers on the importance of the treatment of
25 pain.

1 What we are seeing, not in an isolated
2 document but in documents after documents after
3 documents, are the PBMs acting in concert and
4 collaborating with Purdue and inventing the messaging,
10:47:59 5 for example --

6 MR. WEINBERGER: Pseudoaddiction.

7 MR. MOUGEY: Thank you.

8 -- pseudoaddiction.

9 And we have identified a memo that came
10:48:10 10 from the PBMs appearing to invent the pseudoaddiction in
11 conversations with Purdue participating in that messaging
12 to prescribers and dispensers, the players, the
13 checkpoints in the closed system.

14 And again not an isolated example, but the
10:48:33 15 reeducational campaign that came from the PBMs early on.

16 And why? Purely financial.

17 And as we've laid out in the complaint, the
18 increasing caps of 80 to 160 to 320 milligrams a day is
19 being discussed in the context of rebates or kickbacks.
20 And I'm just going to read just a couple sentences off
21 some documents that isolating this, the data, back to the
22 state for just dispensing misses the entirety of the
23 impact that the PBMs had on the number of dosage units or
24 pills into our communities in that state.

25 It was a conscious decision to put profits

first, increase the daily amounts allowed to patients, all discussed in the context of rebates.

10:50:15 10 And the decisions that were --

11 SPECIAL MASTER COHEN: What is that?

12 MR. HATCHETT: Could I ask, do you have
13 copies of these documents that you could provide to
14 the --

10:50:24 15 SPECIAL MASTER COHEN: Is that an e-mail?
16 What is that?

17 MR. MOUGEY: It's an e-mail and it's Bates
18 Number OPTUMRX JEFFCO 366595, and I'll wait.

19 MR. HATCHETT: Were these cited in anything
10:50:41 20 provided to the Court in advance of today?

21 MS. FITZPATRICK: Excuse me. Laura
22 Fitzpatrick.

23 Excuse me. Good morning. Laura
24 Fitzpatrick for the PEC.

I don't believe these were. We didn't.

1 anticipate needing to use them.

2 I think we're, quite frankly, a little
3 surprised with the arguments that are being made with
4 respect to the relevance and importance of the PBM claims
10:51:05 5 data and other data.

6 I do have copies and am happy to give them
7 to you.

8 And for the record, Special Master Cohen
9 and the Court, these are documents, OptumRx documents
10:51:14 10 where you have the clinical relations folks, the folks
11 that are talking to the P & T committee members, okay,
12 talking about needing to go to battle with the industry
13 relations departments within their own company.

14 The industry relations is who's working
10:51:29 15 with Purdue to form these rebate contracts, you know, and
16 they're concerned about the lucrative nature of the
17 rebate and administrative fees.

18 MR. WASSERMAN: Special Master Cohen, this
19 is Matthew Wasserman.

20 If I could just put a briefly fine point on
21 this.

22 Going back to the decision before you now,
23 should the PBMs have to produce statewide data in New
24 York and Texas --

10:51:55 25 MR. MOUGEY: Special Master Cohen, I'm not

1 even finished.

2 MR. WASSERMAN: I'm sorry. I'm sorry.

3 SPECIAL MASTER COHEN: I thought --

4 MR. MOUGEY: I would like to be able to
10:52:01 5 finish, if I could.

6 SPECIAL MASTER COHEN: Go ahead.

7 MR. MOUGEY: Thank you.

8 MR. HATCHETT: Sorry.

9 Could we just pause until we get copies of
10:52:09 10 the documents?

11 I suspect we will disagree that this would
12 be relevant to the scope of data question.

13 (Pause.)

14 MR. HATCHETT: I'm sorry, I'll let him
10:52:51 15 finish his argument.

16 I don't think that what's in these e-mails
17 is going to be relevant to the geographic scope of data
18 question, but I understand he's going to make the
19 argument, but we have copies of the documents now.

20 10:53:03 SPECIAL MASTER COHEN: Go ahead, Peter.

21 21 MR. MOUGEY: So the importance of these
22 types of documents is the impact and why statewide data
23 is important is the impact of the reeducation campaigns
24 that the PBMs were a material and important part of,
10:53:23 25 rolled out from their own computers and planned and

coordinated with Purdue and then implemented and communicated with doctors and dispensers all over the country.

To be able to track the communication going out, those specific doctors' increases in their script writing and then ultimately the dispensing, to tie and correlate that is going to be a key piece of this trial to be able to tie and connect the material coming out of the PBMs and the impact on that slope of opiates coming into our communities starting back -- we're seeing documents into the mid '90s, into the 2000s, tracking that scope of or quantities of pills coming into our communities and tying that into the marketing and reeducation campaign.

10:54:25 15 I'm just going to read a couple more
16 sentences.

19 MR. MOUGEY: There's a couple different
10:54:30 20 dates.

21 There are documents, like '17, '18, '19 are
22 the documents that I have in front of me.

23 SPECIAL MASTER COHEN: 2017?

24 MR. MOUGEY: Yes, sir.

10:54:38 25 And quite frankly, these are the kind of

1 documents date-wise temporal scope that were produced in
2 Jefferson that routinely mention, "We have been talking
3 about this for years."

4 So we have snippets that we can see in '17,
10:54:56 5 '18, '19 because less than one percent of the documents
6 produced to date predate 2006.

7 SPECIAL MASTER COHEN: So what I'm
8 missing --

9 MR. MOUGEY: Yes.

10 SPECIAL MASTER COHEN: -- I think you
11 started out saying, "We want to talk about temporal."

12 I get why this is addressing temporal, but
13 I'm missing a little bit -- I'm sorry, I'm missing the
14 geographic.

10:55:16 15 MR. MOUGEY: The geographic.

16 SPECIAL MASTER COHEN: Yes.

17 MR. MOUGEY: Because you'll be able to see
18 across the state as the baseline what we've done in every
19 single case to date has been taking the baseline in that
10:55:26 20 state and tracking the increase in the state.

21 And to take little pieces of counties out
22 now, one of the arguments the defendants made earlier is
23 we might need to go third party other defendants on some
24 of the information.

10:55:42 25 We have baselines already created in each

1 one of these states. What caused the increase? We know
2 to date it's been Purdue. What we're finding out is it
3 was also the PBMs.

4 And we'll be able to track across the
10:55:56 5 state. And in order to understand what that is, we have
6 to look at the baselines. And so we can compare
7 apples-to-apples, we have state-to-state-to-state. To
8 try to do something new and different now, you lose the
9 baselines.

10:56:10 10 So this coordinated effort by the PBMs, I'm
11 just going to give you one more example, "I would highly
12 suggest delaying the MED implementation" -- and MED
13 stands for Morphine Equivalent Dosing -- "on all clients
14 until 1/1/18 as we are doing with the new criteria."

15 10:56:28 Here's the key part.

16 "Purdue has a clause built into their
17 agreement that mandates all strengths be unrestricted."

18 This is 2017, 10, 11 years after the guilty
19 plea, and internally the PBMs are discussing, "So we
10:56:46 20 cannot sacrifice rebates on only the 80 milligram
21 strength here. We would sacrifice rebates on all
22 OxyContin scripts."

23 So what we want to be able to do on the
24 data state-to-state is tie and correlate the messaging
10:57:01 25 that started from the earliest data sets we can get on a

1 state, compare the baselines, and be able to track across
2 the state the impact or the correlation of the
3 communications coming out of the PBM with the upward
4 slope coming -- and we can tie it back to those specific
10:57:22 5 doctors in deidentified patients.

6 And we're going to be able to see the
7 increases on the cap when it was 80, the cap when it was
8 160, the cap when it was 320. We can put all of that
9 together.

10:57:37 10 We've already dealt with over two billion
11 lines of data on dispensing, distribution, transactional
12 data. The data that we're asking for here is the PBM's
13 business model.

14 And we heard why that we're unique and
10:57:52 15 different than dispensers and manufacturers and the
16 distributors. Absolutely they're different. This is
17 their business, packaging and selling data.

18 All we're asking for is exact replicas of
19 what they've packaged, what they've harvested, what
10:58:08 20 they've produced over the years to show the impact they
21 had on our communities.

22 To restrict this now, like you said started
23 out as national, we ended up at state, and Judge Polster
24 in the mediations ordered statewide data, and I think it
10:58:25 25 was eight to 10 states for the mediations that failed.

1 This has been a consistent
2 state-to-state-to-state order out of this Court going
3 back several years. And if there's anything unique about
4 the PBMs, there is even a stronger argument that the data
10:58:42 5 should be national, but that's for another day.

6 It certainly can't be less than a state.

7 MR. WEINBERGER: And just a couple other
8 points.

9 Ms. McGowan stated that they adjudicate
10:58:54 10 claims for a whole network of pharmacies.

11 In the -- that's a very interesting point
12 and why the data is not only important, but actually
13 paints for us an even more accurate picture of what was
14 going on statewide or nationwide because if you recall,
10:59:17 15 Special Master Cohen, one of the arguments that Walgreens
16 made is that, "We didn't know what CVS was dispensing, we
17 didn't know what Walmart was dispensing," and Walmart and
18 CVS said the same thing.

19 And so we tried to get data sets from the
20 PDMPs and tried to analyze those so we could see what was
21 happening across the board. But they said -- the
22 pharmacies said that "We didn't have -- we couldn't
23 visualize what was happening with respect to the other
24 pharmacies. We couldn't visualize when John Smith was
10:59:53 25 going from CVS to Walgreens to Walmart. We only had our

1 own data."

2 Well, lo and behold guess who has all the
3 data? These PBMs. And so we are going to be able to,
4 from these data sets, we are going to be able to even
11:00:14 5 more accurately statistically analyze what they knew or
6 what they should have known with respect to the myriad of
7 potential red flags that they should have been looking at
8 at the time that they were authorizing insurance payments
9 as somebody's drugs were being dispensed.

11:00:37 10 SPECIAL MASTER COHEN: I'll let you respond
11 and then we'll take a 10-minute break.

12 MR. WASSERMAN: Thanks. I promise to be
13 brief. Matthew Wasserman.

14 If we're looking at the proportionality,
11:00:48 15 the burden versus the benefit, I think I've explained why
16 the burden for the PBMs is different and more substantial
17 than the burden for the pharmacies.

18 You're talking about a couple hundred
19 retail locations versus thousands of pharmacies
11:01:02 20 statewide.

21 So then it's, all right, what is the need.
22 What do plaintiffs say they need statewide data for?

23 The two things I heard, to run their red
24 flag analysis, and to make these arguments. They can do
11:01:16 25 that with the data that we say we will provide for the

1 Bellwether jurisdictions and the contiguous counties.

2 They've defined the red flag as 25-mile
3 travel to a pharmacy or a prescriber. They can run that
4 analysis. They can make those arguments with the data
11:01:38 5 we're going to provide.

6 This new argument of, well, there were
7 pills flowing in and the PBMs could have stopped and they
8 didn't, they will be able to make those same arguments in
9 the Bellwether jurisdictions.

11:01:53 10 They have ARCos data. They know how many
11 pills were coming into the state. They clearly have our
12 documents. They can make the argument that the PBMs were
13 hiding their head in the sand or looking the other way.
14 And they can make those arguments in the Bellwether
11:02:10 15 jurisdictions looking at the contiguous counties.

16 The two reasons, the two needs that the
17 plaintiffs have put forth today do not justify statewide
18 data.

19 You can make the same arguments, which I'm
11:02:24 20 sure they will, just using the Bellwether jurisdictions
21 and the contiguous counties.

22 And when compared against the burden, we
23 would say it is not proportional to order statewide data.

24 MS. McGOWAN: Emily McGowan for OptumRx.

11:02:40 25 First, OptumRx does not package or sell

1 data and we don't adjudicate claims for pharmacies.

2 We process claims dispensed at many
3 pharmacies for our clients. And I didn't hear anything
4 that addressed the client-specific nature of the data and
11:02:58 5 the fact that if the alleged harm is in the plaintiffs'
6 communities as they say, then we should be focused on the
7 data that relate to clients who have concentrations of
8 members who live there and fill their prescriptions
9 there.

11:03:12 10 So, you know, distorting a couple of
11 rebate-related documents does not affect the geographic
12 arguments that we've made today.

13 MR. MOUGEY: Twenty-five miles, 25 miles or
14 more. I mean, I don't think they understand.

11:03:28 15 SPECIAL MASTER COHEN: I got it.

16 MR. MOUGEY: Just -- okay.

17 SPECIAL MASTER COHEN: Okay. It's 11:00
18 o'clock.

19 Why don't we take a 15-minute break, come
11:03:36 20 back at 11:15? Smoke them if you've got them.

21 Thank you.

22 (Recess taken.)

23 SPECIAL MASTER COHEN: I am not going to
24 issue a ruling at this moment on geographic scope.

11:25:57 25 I may issue it before we all leave here

1 today, but I need to reflect on that a little bit more.

2 By the way, I should mention over here,
3 Scott Loge, he's on the team. You all should say hello
4 to him at some point. He was Judge Polster's law clerk
11:26:14 5 when this MDL came in, and has been working on it from
6 the very beginning, as have I.

7 When I am not available, which will happen,
8 he's one of the folks that you can get in touch with.

9 Okay. So the next one I want to touch on
11:26:33 10 is Agenda Item Number 340. This is the identity of the
11 P & T committee external members.

12 Sue, that's P-ampersand-T, P & T committee
13 members.

14 So the first thing that I want to ask is I
11:26:54 15 don't see any reason and didn't see any discussion, any
16 response by the PBMs to the suggestion from the
17 plaintiffs that members of that committee who are ex
18 officio who are no longer members shouldn't be
19 identified.

20 MR. COOPER: Thank you, Special Master.

21 This is Jonathan Cooper for Express
22 Scripts.

23 So we do object to releasing the names of
24 the former P & T members. In our most recent submission,
11:27:28 25 we gave, I believe, at least two primary reasons to keep

1 them confidential.

2 One, to prevent lobbying, and that has less
3 relevance to the former officials or the former voting
4 members, but I'll get back to that.

11:27:39 5 SPECIAL MASTER COHEN: I didn't see any
6 relevance to it, but go ahead.

7 MR. COOPER: Well, just to address it,
8 sometimes former members become current members again,
9 and so if you look at the criteria that the P & T
11:27:50 10 committee uses for selecting members, one of the four
11 main criteria is former experience on P & Ts. And
12 members can be reappointed. Sometimes they're
13 reappointed consecutively; sometimes there can be a gap
14 in time.

11:28:02 15 But so once those names are out there, that
16 means if they are ever put back on that, that opens that
17 lobbying problem.

18 And then the second reason is, as we said
19 in our most recent submission, there's a severe chilling
11:28:17 20 effect on getting the most qualified doctors and
21 physicians to serve on P & Ts. And if we're releasing
22 the former names, there's still going to be a chilling
23 effect there.

24 It may not be as great as releasing current
11:28:30 25 members, but there is still that chilling effect.

9 What about addressing it that way?

11:29:01 10 MR. COOPER: Yeah.

11 A couple points on that, Your Honor.

12 So, first, at least with the existing
13 protective orders in the case, as we noted in our
14 submission, they don't prevent information from becoming
15 public.

16 Judge Polster stated in his ruling last
17 week on the disqualification motion that protective
18 orders protect information until they are part of the
19 trial record and then, you know, it may be fair game for
20 the public.

21 The current protective orders in this case,
22 as I understand them, don't have any provisions
23 protecting information at trial.

24 So at least under the existing protective
11:29:33 25 orders, they would be, we believe, insufficient to

1 prevent irreparable harms we've laid out in our letters.

2 I would also note, and we put this in our
3 submission, that plaintiffs' counsel, in -- who have
4 access to information in the MDL have used that
11:29:49 5 information publicly in other cases and taken the
6 position that they don't need to comply with the MDL
7 protective orders.

8 And so again, we think there's a
9 significant risk of this information getting out there.

11:30:01 10 And even within the MDL, as we noted, it's
11 not clear at this point who even has access. Right?

12 There are so many different, hundreds if
13 not thousands of lawyers, experts, consultants, not only
14 working on MDL cases, but thousands of MDL cases, but
11:30:16 15 also at this point my understanding is a lot of attorneys
16 in cases outside the MDL get access to the MDL
17 repository.

18 And so there's just a huge volume of people
19 who are getting access to this information, including
11:30:28 20 some of the very people who Express Scripts would be at
21 pains to prevent them from knowing this information so
22 that they couldn't improperly lobby the P & T members.

23 SPECIAL MASTER COHEN: How do you respond
24 to the plaintiffs having pointed out that there is one
11:30:41 25 fellow who has it on his LinkedIn and they say there are

probably others and "We shouldn't have to run around and find them"?

3 MR. COOPER: Right.

4 So let me -- I think there's a really
11:30:50 5 important distinction here that needs to be brought out.

6 So there's a big difference between Express
7 Scripts and Medco.

8 So the examples, all the examples that the
9 plaintiffs use in their letter of P & T members not
11:31:01 10 having their identities confidential are about Medco, and
11 my understanding is Medco treated confidentiality
12 differently than Express Scripts.

13 And Express Scripts, as we put in -- as
14 Mr. Andrew Behm put in the declaration that we submitted
15 on Tuesday, attested that to the best of our knowledge
16 Express Scripts has never voluntarily provided the
17 identities of Express Scripts's P & T members to anyone
18 other than the Government regulator CMS, which has strict
19 confidentiality provisions in place for just that reason
20 because they have to approve all the formularies that are
21 selected by Medicare Part D plans. And as part of that
22 approval process, they want to confirm that the P & T has
23 people with certain specialties and things like that.

24 And one other point on this, Special
11:31:48 25 Master, just to go back to your prior question about

1 protective orders.

2 The *In Re: Epipen Multi-District*
3 *Litigation* in Kansas, we cite, I think, four rulings from
4 that Court. In that case there was a protective order,
11:32:01 5 and the plaintiffs made the exact same argument there as
6 here that, one, P & T members are relevant, we need to
7 know who is making the P & T decisions, we want to depose
8 them, we want to find out what they were thinking.

9 Two, there's a protective order in place,
11:32:13 10 and there was absolutely a protective order in that case
11 just this year, and that's sufficient.

12 And the Court there rejected those
13 arguments, and we gave you four separate rulings that
14 time and again rejected them on the ground that the
11:32:25 15 marginal benefit of getting these identities -- when we
16 have given access to and have agreed to provide more
17 discovery into the P & T committee -- so the marginal
18 benefit of getting that additional information about the
19 identities, when compared to the vast destructive effect
11:32:43 20 of providing that information, we would submit is not
21 proportional and warrants a protective order preventing
22 that kind of disclosure in discovery.

23 SPECIAL MASTER COHEN: Do you mind if I go
24 to plaintiffs?

11:32:55 25 MR. COOPER: Absolutely.

1 SPECIAL MASTER COHEN: Mr. Irpino, you're
2 going to --

3 MR. IRPINO: Yes, on behalf of the PEC.

4 SPECIAL MASTER COHEN: Let me ask you a
5 question.

11:33:08 5

6 So explain to me what you hope to do with
7 the information that you would obtain if you get these
8 names.

9 MR. IRPINO: Well, I will, but I know my
0 boss is going to -- is going to usurp me here.

11:33:16 10

11 MR. FARRELL: This is Paul Farrell on
12 behalf of the PEC.

13 There's dominos to how my brain works and
14 the sequence of things, and this is a little out of the
15 sequence, but in general, what I have is I've taken a
16 real good look at the P & T policy from Optum and the
17 P & T policy from ESI.

11:33:36 15

18 We don't need to get into the merits of it,
19 but in general what it looks like is that there is a
20 committee that was formed at both of these companies
21 whose purpose was to review the safety and efficacy of
22 drugs.

11 24 00 30

23 And so at some point in time, OxyContin was
24 launched upon this planet and at some point in time the
25 members of the P & T committee reviewed the safety and

11:34:20 25

1 efficacy and the clinical guidelines related to what we
2 describe as pharmaceutical grade opium, and approved them
3 to be on national formularies.

4 Now, there are other committees within
11:34:41 5 these organizations, but we started at the P & T
6 committee to make a dive.

7 You know, we've talked about the breadth of
8 discovery and the depth of discovery, and so what we are
9 asking for is we're asking for you to allow us to perform
11:34:58 10 a deep dive on the role these companies had with Purdue
11 Pharma and its interactions with the placement of
12 OxyContin on formularies for both of these companies.

13 And so we think that the relevance of the
14 P & T committee, the comments that were made, the
11:35:19 15 discussions that were had with the P & T committee is of
16 absolute obvious relevance.

17 And, quite frankly, I want to depose the
18 members of the P & T committee that made the decision to
19 put unrestricted OxyContin on national formularies across
11:35:39 20 the country.

21 SPECIAL MASTER COHEN: Well, so what about
22 staging it?

23 What about if you were to get the documents
24 with redacted names, and see what you see, and then come
11:35:53 25 back to me and say, "Look, here is the reason we need to

1 depose these folks and know who they are. This is what
2 they said, this is what they did, this is the
3 interactions they had with other folks"?

4 In other words, the PBMs are pointing to
11:36:09 5 some legitimate reasons to keep this information
6 confidential. You can make a face, but I think that's
7 true.

8 And so what about coming at it slowly?

9 MR. FARRELL: So I'll --

11:36:22 10 SPECIAL MASTER COHEN: I'm sorry, let me
11 add one other thing.

12 You know, I think in your letter you said,
13 for example, "We're concerned that some of them may have
14 been KOLs" or something like that.

11:36:36 15 Well, you could give me a list. I'm making
16 this up, right? You could give me a list of the people
17 you're concerned they might be or might have been friends
18 with, and I can get a list in camera of who they were and
19 look to see if there's any there there.

20 MR. FARRELL: Yeah, in a vacuum, Special
21 Master, I don't mind taking this slower than we're
22 already taking it, you know. I've expressed this, my
23 frustration with the process.

24 We don't have documents in this time frame.
11:37:11 25 We don't have some of these defendants acknowledging that

1 they're going to respond to discovery. We have a family
2 defendant issue. We have a temporal issue. We have a
3 reliance upon DR-22 as discovery responses in this
4 litigation, but half of the documents are redacted
5 without privilege logs.

6 So we have so many different fundamental
7 problems.

What I'm really trying to do with these two particular issues is use it as a platform to demonstrate we have a temporal scope issue that we need resolved.

11 SPECIAL MASTER COHEN: Right.

12 MR. FARRELL: And we have a redaction issue
13 that we need resolved.

14 So I don't know why it is that they're so
15 skittish about the identities of their P & T committee
16 members because, despite what Express Scripts says, I can
17 tell you that it's in the public domain.

18 This isn't like you remember 2018 when the
19 DEA said that if we disclosed the identity of the
20 warehouses, there will be armed robberies in the streets?

21 SPECIAL MASTER COHEN: Yes.

22 MR. FARRELL: And we stood up and we showed
23 that it's on their websites.

So I get that there's some skittish remarks
or some skittish feelings about this, but I think, you

1 know, I don't mind starting with deidentified names if we
2 get the documents back to '95, '96.

3 I don't know. They haven't produced them
4 anywhere in the country ever.

11:38:45 5 So what we've done is we've taken the ESI
6 policies and procedures and the Optum policies and
7 procedures for the P & T committee to understand what the
8 function of them, of these committees are, what work
9 product should have been seen, what work product should
11:39:06 10 have been generated, what intercommunications should have
11 had within the P & T committee, what
12 intracommunications -- other way
13 around -- intercommunications should have happened with
14 other committee members, and what information they relied
11:39:27 15 upon.

16 If I get to see that, I can make an
17 informed decision of you know what? We don't need to
18 know their names. We don't need to depose them.

19 But all that being said is we've protected
20 national security interests DEA data without breach.
21 We've been here for seven years and abided by your
22 protective order terms. And just because they say it's
23 sensitive don't make it so, and it could apply to every
24 one of their committees.

11:39:57 25 All that being said is if you give us the

1 documents in the time frame that we're looking at for us
2 to review, maybe I can make a more informed decision on
3 why these names are top secret.

4 SPECIAL MASTER COHEN: You want to correct
11:40:11 5 anything your boss said?

6 MR. IRPINO: A lot of things, but no, I
7 don't want to correct.

8 I do want to add, I mean we see this kind
9 of scattergun of this is -- you know, the world is going
11:40:26 10 to come to an end if these names get out there.

11 And what I certainly agree with is that we
12 have held some of the deepest darkest secrets of some of
13 these various companies in this litigation for many
14 years.

11:40:38 15 And I just want to give you the example,
16 Special Master Cohen, of IQVIA, who their company is
17 going to come crashing down if that information got out.
18 And we worked out a deal, and we had an Attorneys Eyes
19 Only deal, and the information did not get out.

20 But it was a critical, fundamental issue
21 for us to get that information and to get that data, and
22 we used it. We used it successfully, and we were able to
23 maintain the level of confidentiality that they needed
24 over it.

25 So I don't want to equate us knowing these

1 names with a *Washington Post/New York Times* article
2 containing the names. It's just not the case.

3 Now, there was a point made about a big
4 difference between Medco and Express Scripts, and that's
11:41:33 5 fine. So if that's the case, then as a baseline we
6 should get all the Medco names as a baseline. But the
7 fact of the matter is we should get all the names because
8 there is a protective order in place, and these documents
9 are marked Attorneys Eyes Only.

11:41:54 10 That means something. We are officers of
11 the Court.

12 We're pretending like this company is going
13 to come crashing down if the outside counsel get the
14 information. And the fact of the matter is we have three
11:42:05 15 levels of confidentiality, Special Master: Regular,
16 highly confidential, and Attorneys Eyes Only highly
17 confidential.

18 And these are all marked Attorneys Eyes
19 Only. So you cannot have, as it was suggested, any of
11:42:20 20 these defendants see this information.

21 Their in-house counsel cannot see the
22 information. Their outside counsel can, but not their
23 in-house counsel. So you cannot even have in-house
24 counsel for these defendants see the documents.

11:42:38 25 So that's to begin with.

1 Uh-oh.

2 MR. FARRELL: And I'll --

3 MR. IRPINO: Boss time.

4 MR. FARRELL: Without belaboring the point,
11:42:47 5 the one additional thing is they don't even treat it this
6 confidential within their own companies. They allow
7 their member sponsors to sit in, and some of them
8 livestream their P & T committee.

9 SPECIAL MASTER COHEN: Let me just go ahead
11:42:59 10 and rule because I already know where we're going to go.

11 So I want the parties to meet and confer
12 and figure out how it is that these names are going to be
13 unredacted.

14 If you think that the existing protective
11:43:12 15 order is somehow insufficient, as I recall there was a
16 suggestion by the plaintiffs that we can make a tighter
17 loop. Maybe you can negotiate that, but the names are
18 going to get unredacted.

19 Having said that, that's a very different
11:43:28 20 question from whether somebody gets deposed, right? So
21 the chilling effects that you're worried about, that
22 comes if somebody is forced to come and answer questions
23 from an attorney.

24 I'm not addressing that today. That's a
11:43:43 25 different question. And as Paul suggested, the necessity

1 of that may depend on the documents that are actually
2 produced.

3 But I think the simple identity of these
4 folks is something that needs to be disclosed. Documents
11:43:59 5 need to be unredacted with those names.

6 And as I said, if you think that there's a
7 reason to create a fourth level of confidentiality that
8 is restricted only to lead counsel, for example, then you
9 can try and negotiate that.

11:44:17 10 Okay?

11 MR. IRPINO: Thank you.

12 MR. FARRELL: One more thing, Special
13 Master Cohen.

14 So my reading of both the ESI and Optum's
11:44:31 15 policies and procedures is that they don't consider the
16 P & T members to be employees.

17 And so if there are P & T members that
18 whose names are in the public domain -- for instance,
19 many of Optum's defendants list them, their role on P & T
20 committees, in their medical literature -- and we've said
11:44:50 21 this out loud and now I'm saying it on the record, it, in
22 the absence of an Attorney-Client Privilege, it is our
23 intention to contact some of those former P & T members.

24 And unless counsel for either Optum or ESI
11:45:08 25 claims that they represent those individuals, there's no

1 prohibition from us doing so.

2 SPECIAL MASTER COHEN: Appreciate that you
3 said that. I'll let you guys figure that out as you go
4 forward.

11:45:19 5 MR. COOPER: Special Master Cohen, I
6 understand you've made your ruling.

7 Just to be clear, it's going to be
8 something we appeal. Just so I can understand, are you
9 planning to issue any further ruling on this issue?
11:45:29 10 Especially given you said you want us to meet and confer.

11 I just want to make sure we are squared away on when we
12 need to lodge an appeal, because this is not something
13 that Express Scripts will accept.

14 SPECIAL MASTER COHEN: Thank you for
15 raising that. I'm glad you did.

16 Right. So as I said before, anything that
17 I do by way of ruling today on the record is immediately
18 appealable.

19 The only question is the deadline.

11:45:54 20 It's a very thoroughly addressed issue in
21 your letters.

22 Is a week enough?

23 MR. COOPER: A week to file an appeal, you
24 mean?

11:46:12 25 SPECIAL MASTER COHEN: To file what would

1 be an objection to my ruling.

2 MR. COOPER: Right.

3 Would it be possible to have two weeks,

4 Your Honor?

11:46:17 5 SPECIAL MASTER COHEN: No.

6 MR. COOPER: Okay. Well, I guess we will
7 do with a week then.

8 SPECIAL MASTER COHEN: I would have given
9 you 10 days.

11:46:22 10 MR. COOPER: That would have been a Sunday.

11 MR. HATCHETT: Special Master Cohen, so
12 this is Andrew Hatchett for OptumRx.

13 We will likely join in the appeal with
14 Express Scripts.

11:46:37 15 SPECIAL MASTER COHEN: Objection.

16 MR. HATCHETT: But I have one other
17 clarification as to the informal order or order from the
18 bench.

19 At the beginning of this you noted a
20 distinction between current P & T members and former
21 P & T members.

22 At least with respect to your order today,
23 would you be willing to limit that to former P & T
24 members and not current P & T members?

11:47:04 25 SPECIAL MASTER COHEN: No. Let's tee it

1 up.

2 MR. HATCHETT: Sorry, did you want us to go
3 to that question separately? Sorry.

4 SPECIAL MASTER COHEN: Maybe I don't
11:47:14 5 understand what you're saying, but no, my ruling is that
6 both former and current need to be disclosed.

7 MR. HATCHETT: Okay. Understood.

8 SPECIAL MASTER COHEN: Right.

9 And so just -- and just being careful about
11:47:24 10 the language, you will be filing an objection to a formal
11 ruling because it is on the record.

12 And the deadline is close of business one
13 week from today.

14 MR. HATCHETT: Understood.

11:47:35 15 SPECIAL MASTER COHEN: Okay?

16 And obviously plaintiffs can respond.

17 And that would be going to the Judge.

18 Okay. The next thing I have written down
19 is Agenda Item 348, which is the organizational charts
11:47:56 20 issue.

21 So I was confounded before and I'm
22 confounded again.

23 I was confounded before when other
24 defendants were very slow to produce organizational
11:48:12 25 charts, and I had to be very firm to make that happen.

1 And again I'm confounded. It just doesn't
2 seem like something that should be all of that difficult
3 to produce, and so I guess I need to understand from the
4 defendants why that seems to be true.

11:48:32 5 And frankly, I just expect that you're
6 going to tell me that within a very short period of time,
7 all organizational charts from all family members for
8 each defendant will be produced in legible fashion so
9 that the plaintiffs can see who it is that played
11:48:49 10 different roles.

11 Because before that happens, you really
12 can't get at the custodian issue. I'm really curious how
13 you've managed to get as far as you have without
14 organizational charts, but I can tell you I come to this
11:49:05 15 not understanding why it's taking so long to do something
16 that seems so simple.

17 MR. HATCHETT: So this is Andrew Hatchett
18 again for the Optum and United defendants.

19 So I have a couple points that I will
20 explain because I do think it's helpful to have some
21 context and clarity on what the issues are and what the
22 challenges are.

23 From an objection standpoint, I want to
24 make very clear that we are not objecting to producing
11:49:26 25 organizational charts, so we have no objection. We're

1 not standing on any objection related to the production
2 of organizational charts.

3 SPECIAL MASTER COHEN: Great.

4 MR. HATCHETT: We are also not withholding
11:49:37 5 any responsive organizational charts based on any sort of
6 objection.

7 So I understand the Court's sentiment that
8 this -- or assumption that this would be a simple task.

9 The plaintiffs also come at it with that
11:49:53 10 initial assumption.

11 What I can tell you is that it is not as
12 simple as that would seem to be.

13 So we have asked many key critical
14 employees in the company that would know if there were
11:50:06 15 organizational charts, whether we have organizational
16 charts kept in any sort of a central repository that
17 would be accessible and available.

18 And the answer is repeatedly no.

19 If you look at the organizational charts
20 that we have produced to date, you'll notice that across
21 the eight or nine, 21 pages of organizational charts that
22 we've produced, they all look very different, and that
23 reflects the fact that there is not a systemic
24 corporate-wide organizational chart structure that is
11:50:37 25 created or maintained in the ordinary course of business.

1 | Particularly not as you go back in time.

2 So there just is not a folder, a shared
3 drive location called "Organizational charts" that you
4 can go to and access organizational charts.

11:50:49 5 What we have found as we interview people
6 is that heads of departments, team leads will sometimes
7 create organizational charts for various purposes.

So we find them in PowerPoint text.

16 But those are kind of baked within those
17 handbooks. We haven't found them in another location.

18 We have found them where people have
19 created them and put them in PowerPoint presentations as
11:51:36 20 they're talking about who their team is and various
21 informal purposes, but we've had to effectively gather
22 those through what amounts to a custodial collection.

23 SPECIAL MASTER COHEN: Right.

24 MR. HATCHETT: And so it does require going
11:51:48 25 to individuals asking them if they had them, gathering

1 them and collecting them and so --

2 SPECIAL MASTER COHEN: Let me interrupt,

3 I'm sorry, but let me ask you a question.

4 It's the information, of course, that

11:51:58 5 matters; not the presentation, right?

6 So maybe it occurs to me that the
7 information that the plaintiffs want, and you're willing
8 to give them, is being asked for in not the wrong way,
9 but not the best way, which is to say they've asked for
11:52:14 10 organizational charts.

11 Well, those charts don't exist perhaps for
12 various reasons or they've been lost over time, so what
13 about a quick depo of folks in HR with their records? I
14 mean, all of the information about who held what jobs
11:52:32 15 when has to be somewhere, and it's probably in HR.

16 So we get the Director of HR to sit down
17 and explain it.

18 MR. HATCHETT: Yeah, I mean, so if you look
19 even on the -- so a couple things I want to also clarify,
11:52:46 20 and I'm going to come back to this.

21 So just we produced the organizational
22 charts, the 21 pages that are attached to some of the
23 documents as part of this process of going around to key
24 leaders within groups and departments and talking to
11:53:02 25 people at the new defendants that have been added within

1 the last, you know, seven days or we responded to
2 discovery within the last seven days.

3 We are asking the same sorts of questions
4 and we have gathered some.

11:53:13 5 So within the next week we will be
6 producing several dozen additional organizational charts.
7 They all look different. They come from different
8 sources, different places, but we have a substantial
9 additional number of organizational charts that we are
11:53:28 10 going to provide.

11 But one of the challenges, even if you look
12 at the ones that are in the record that we've produced,
13 the 21 pages, there are over 500 names identified even on
14 those organizational charts.

11:53:40 15 And so I can assure -- I haven't talked to
16 the HR Director myself, but I think it is very unlikely
17 that you're going to be able to go to an HR Director,
18 have them sit down and be able to explain to you who
19 these people are, what job functions they're serving, and
11:53:56 20 how it might relate to the issues in this case because
21 we're going to have a lot of people, a lot of names that
22 appear on organizational charts that really don't have
23 relevant information on the particular issues in this
24 case.

11:54:06 25 We obviously understand that our job as,

1 you know, attorneys acting in a professional manner with
2 candor toward the Court and candor towards our opposing
3 counsel is to help to identify who are the relevant
4 individuals, and so we are obviously working toward that.

11:54:23 5 We are willing to provide information about
6 the individuals that we've identified. We are -- you
7 know, we'll respond to questions and inquiries about it.

8 We have produced to date from the Jefferson
9 County production it's more than 60,000 documents,
11:54:39 10 220,000 pages of material, that appears to have been used
11 by the plaintiffs to identify many of the other names.

12 As discovery progresses, if they find that
13 we have missed some critical employee, obviously we will
14 engage. There's actually a footnote in the CMO that
11:54:56 15 gives the right to, you know, bring that to our attention
16 and we will discuss individuals, if they think that we've
17 missed somebody.

18 But we are working very hard to engage with
19 our clients to identify who the appropriate individuals
11:55:06 20 are and to identify those people, explain the functions
21 they serve, and why they would possess the relevant
22 responsive information.

23 We are also trying to do that through
24 organizational charts.

11:55:16 25 So again, we've produced some. We are

1 producing more. We just can't produce them out of a
2 folder. It requires actually going to individuals,
3 asking what they have, gathering it, and what amounts to
4 a custodial collection.

11:55:30 5 And so when you're talking about a case
6 across 10 defendants, it is a divide and conquer for our
7 team, but we are on calls with the client daily
8 interviewing people, asking these questions.

9 We just are not able to gather them
11:55:42 10 overnight, and so we are doing it at warp speed, at the
11 speed that is the fastest that we can essentially.

12 SPECIAL MASTER COHEN: Well, so as I said,
13 I'm happy to hear that the parties have identified some
14 custodians, are talking about who custodians are.

11:55:59 15 Organizational charts is a part of that
16 process, and the fact that they are slow in coming is
17 slowing it down perhaps a bit.

18 I don't want that to be slowed down. I
19 appreciate very much your statement that you're, in good
11:56:14 20 faith, making efforts and are telling the Court and
21 you're telling the plaintiffs that you're trying to
22 provide information.

23 When I look at your discovery responses,
24 that is not the sense that I am getting.

11:56:24 25 There's some objections there that set my

1 teeth on edge so I'm sure it set the plaintiffs' teeth on
2 edge. I haven't shown them to the Judge because I don't
3 want his teeth to be set on edge.

4 So I really suggest that you try and come
5 at some of those discovery responses in a different way,
6 and I think that this is one of them.

As I've said, I've dealt with this issue before and I had to get firm, and all of a sudden charts appear.

11:56:52 10 And like I said, I am going to make sure
11 that this information gets transferred over from the
12 defendants to the plaintiffs. And if it happens, if it
13 has to be that 10 different companies' HR folks get
14 deposed, that's how it's going to happen.

11:57:08 15 So I'm just urging you to take that as
16 seriously as you say you are taking it, and to hurry and
17 get it done.

18 MR. HATCHETT: Understood.

19 SPECIAL MASTER COHEN: That's for everybody
11:57:17 20 there on the defense side.

21 | Okay.

22 MS. SINGER: Special Master Cohen, I have
23 just a point, if I can add to this. Linda Singer for the
24 PEC.

So again I take in good faith the

1 representations that have been made, notwithstanding the
2 history here on this one, but the history is actually
3 important.

4 We have to identify these custodians, and I
11:57:48 5 know you get it so I'm not going to argue the other side
6 of this.

7 But I think there need to be deadlines. I
8 think we need OptumRx -- and I assume this is true for
9 Express Scripts as well -- to respond to our
11:58:00 10 prioritization rather than theirs.

11 So if an org chart doesn't exist, if we
12 identify industry relations or clinical or another area
13 of the company or a time period, we do that because those
14 are the gaps we've identified so we can meet the Court's
11:58:16 15 deadline in identifying custodians for ourselves and not
16 relying exclusively on their selection.

17 So it would be helpful to get some guidance
18 from you that we need defendants to move on the
19 priorities we set within reasonable time frames.

20 MR. HATCHETT: And I'm not familiar with
21 what Ms. Singer is referring to.

22 Obviously, if there are particular requests
23 for prioritization, we will engage with plaintiffs'
24 counsel in good faith to do that.

11:58:44 25 SPECIAL MASTER COHEN: I'm going to leave

1 that to your meeting and conferring, but I think that the
2 defendants understand from what I've said that if -- I'm
3 not going to say how many days -- but if the issue is
4 reraised with me and I haven't seen very substantial
5 progress, they get the message.

6 So I think that's all I need to say at this
7 juncture.

8 MS. SINGER: Thank you.

9 SPECIAL MASTER COHEN: So the two biggies
11:59:16 10 that are left on the agenda are temporal scope, both of
11 documents and data.

I'm just trying to decide whether you all want to go to lunch, or we should just keep going.

14 I see one lunch nodder.

11:59:32 15 MR. FARRELL: I'd love to have some food.

16 SPECIAL MASTER COHEN: Okay.

17 MR. FARRELL: And caffeine.

18 SPECIAL MASTER COHEN: It's just short of
19 straight up noon, so why don't we come back at 1:00
20 o'clock?

21 MR. WEINBERGER: Is the cafeteria closed
22 downstairs.

Sue is nodding yes, so if you need food,

1 that means you are leaving the building, going through
2 the walkway to Tower City, and that's where the
3 restaurants are.

4 MR. WEINBERGER: Okay.

11:59:59 5 SPECIAL MASTER COHEN: Thank you, all.

6 See you all at 1:00 o'clock.

7 | (Luncheon recess taken at 12:00 p.m.)

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1 THURSDAY, MARCH 28, 2024, 1:05 P.M.

2 SPECIAL MASTER COHEN: Welcome back.

3 Okay. So we'll pick up where we left off.

4 I have some miscellaneous stuff, but three
13:08:30 5 agenda items with numbers which are 345, 344 and 341, all
6 of which have to do with temporal scope of document
7 production and temporal scope of data.

8 I've read these, and of course there's a
9 long history of discussion -- everybody should have their
13:08:59 10 phone away from microphones.

11 And as a general matter, depending on what
12 kind of defendant you were and what kind of data we're
13 talking, it ran back to either 2006 or 1996.

14 The defendants have suggested different
13:09:33 15 dates for different sorts of data ranging from 2006
16 generally to 2009, 2014, et cetera.

17 The plaintiffs want it to run back much
18 earlier, both as to documents and data.

19 So first of all, one of the things that the
13:10:02 20 defendants say is, "We don't have the data." If you
21 don't have the data, you don't have the data. That's
22 beyond -- that doesn't need discussing. You can't
23 produce something that doesn't exist.

24 The question is what about the stuff you do
13:10:14 25 have, how far back do you have to look for it? And I'd

1 like to hear from the plaintiffs first to explain to me
2 why 2006 isn't far back enough, and maybe it is for some
3 of this and maybe it isn't for others.

4 But I'd also like you to noodle with this
13:10:37 5 question, which I just came up with during lunch, and
6 it's really -- it's really just kind of a bit of a game I
7 suppose, but if the totality -- if I conclude, which I
8 have not, excuse me, that the totality of the production
9 that you're asking the defendants to make geographically
13:10:57 10 and temporally together is too burdensome, then, you
11 know, choose your haircut.

12 Do you want it to be less broad
13 geographically but have it go as deep as you want
14 temporally, or would you rather forego documents and/or
13:11:20 15 data that goes back to 1996 in exchange for getting all
16 of the geographic you want?

17 It's just kind of a way for me to think
18 about, to hear what you have to say, to understand what's
19 more important to you, frankly.

13:11:35 20 I'm not saying I'm doing that. I'm just
21 giving you something fun to have to answer.

22 MR. FARRELL: I'll take the first crack at
23 this. Paul Farrell for the PEC.

24 DR-2 and DR-3 was not a victory for the
13:11:54 25 plaintiffs. It was a hotly contested, argumentative,

1 hostile debate with this courtroom sitting here, with
2 lawyers filled to the rim, and so the balance that you
3 struck we lived with, and we were able to create records
4 that we were largely successful with.

13:12:19 5 Bringing in new defendants who are using
6 that as some type of ceiling or default from which they
7 can argue about doesn't change the position that we
8 wanted more for a longer period of time, six or seven
9 years ago, and this is where we ended up.

13:12:43 10 So to quote one of my colleagues earlier,
11 the PBM defendants seem to be very quick to point out
12 your rulings in the past that are in their favor, and a
13 little slower to point out the rulings that we're asking
14 you to enforce.

13:13:00 15 So I understand why it's easy to find some
16 compromise between the disputes of geography and
17 temporal. It's not that easy for us.

18 To succinctly state our geographic
19 statement, and you know this from the prior ARCos data,
20 we need a denominator. We need a baseline by which to
21 compare the local Bellwether. And we asked for more. We
22 asked for nationwide, and then it got slapped down to
23 regional, and then it got slapped down to state.

24 And I'm just not quite sure that you're
25 going to get us to concede that we go and change the

1 paradigm by which we've been measuring data for seven
2 years because the PBMs say that it's burdensome.

Now, if this is a burden argument or if the documents don't no longer exist, that's fine. You can answer that. We can argue burden all day long. We can argue -- you can simply say they don't exist after reasonable inquiry.

22 But for the initial DR-2 and DR-3 rulings
23 you made five years ago, you made a determination that
24 this is the time frame in which the claims are relevant.

So what I'd like to direct your attention

1 to, first --

2 SPECIAL MASTER COHEN: Just to be clear,
3 when you say I made, it was I and the Court made.

4 Go ahead.

13:15:29 5 MR. FARRELL: Yes. That's a very important
6 point is that it was -- it was disputed between the
7 parties. It was submitted to the discovery master. The
8 discovery master made rulings. Those rulings were then
9 asked for reconsideration.

13:15:45 10 You reconsidered -- Special Master
11 reconsidered it, and cut everything in half basically,
12 and then it got appealed up to Judge Polster, and he
13 affirmed it all.

14 So the first document that I would like you
13:16:00 15 to take a look at is a document that I've circulated and
16 used before, and I'm going to start with ESI just because
17 it's the cleanest.

18 And this is a copy for the Court and for
19 the parties. And it's the 1997 Purdue Pharma contract.

13:16:24 20 MR. VANDEN HEUVEL: Your Honor, this is
21 Sage Vanden Heuvel for Express Scripts.

22 I just want to object to the fact that
23 plaintiffs did not include these documents in the set of
24 documents they provided to you for this hearing so.

13:16:34 25 MR. FARRELL: That's just not true.

1 This literally is the document that I
2 attached and sent to you that you complained wasn't ripe
3 enough to go in front of the Special Master, so this is
4 the document for eight weeks I've been saying establishes
13:16:48 5 the temporal scope.

6 And if you look at it, the reason this is
7 important is this is a document dated April of '97. It's
8 the earliest I have found for Express Scripts.

9 And if you notice at the bottom right-hand
13:17:03 10 corner, this is not an Express Scripts document. This is
11 a Purdue Pharma document. We got this from the Purdue
12 archives. All right.

13 So if you turn to Page 4 of the document --
14 and it's, for the record, it's Bates stamp P as in Papa
13:17:27 15 Delta Delta, PDD 1701198993, when you look at Paragraph 4
16 in the --

17 SPECIAL MASTER COHEN: Sorry, 993 or 996?

18 MR. FARRELL: Well, what you're looking at
19 is 996.

13:17:43 20 I was identifying for the record the front
21 page of the document.

22 SPECIAL MASTER COHEN: Oh. Go ahead.

23 MR. FARRELL: Yes.

24 The document page that you're looking at is
13:17:50 25 996.

1 If you look in the top left-hand corner
2 where it says "Reimbursement," this is what we will begin
3 the dialogue of what you would expect to be the standard
4 rebate agreement.

13:18:03 5 All right. This is what you would expect
6 to see is that you have Purdue Pharma contracting with
7 Express Scripts as early as '97 on rebate agreements.

8 Now, if you look down at 4.5 at the bottom
9 of the page, what you're going to find is 4.5.1, all the
10 way to 4.5.10, you're going to see specific data fields
11 that Purdue Pharma and Express Scripts contracted would
12 be shared from Express Scripts to Purdue Pharma.

13 You're going to see in the middle of Page 5
14 ending in 997, "PBMs shall provide overall total amounts
15 and quantities to be rebated, summarized by NDC number."

16 You're going to look on Page 7 ending in
17 Bates stamp 999, where there is a record retention policy
18 where it says, "The PBMs shall maintain complete and
19 accurate records relating to the prescribing, dispensing
20 and sale of products to members."

21 And then here's where this is -- this is a
22 question -- this is an issue that is of most importance
23 to the PEC. Page 8, ending in Bates stamp 000,
24 Paragraph 6.1 is something different.

13:19:37 25 Paragraph 6.1 is not a rebate agreement.

1 Paragraph 6.1 is a different contractual obligation
2 between Purdue Pharma and Express Scripts to do something
3 else; for them to have quarterly meetings, for them to
4 engage in professional services.

13:19:58 5 And what I'll submit to you, Special Master
6 Cohen, is that as the years proceed between the date of
7 this document and the date the documents began produced
8 in the Jeff Co. litigation, this contract splits into
9 two: Into a rebate agreement and into a professional
10 services agreement.

11 So part of our case is going to be to
12 explore the professional services between Express Scripts
13 and Purdue Pharma dating back to the launch of OxyContin
14 as earliest as we can find expressed in this '97
15 document.

16 And then the final thing I want to point
17 out to you about this as you flip to the latter pages is
18 this isn't tangential. If you flip to Pages 11, 12 and
19 13, this is OxyContin.

13:20:56 20 It's not like we're getting off on some
21 tangent. This is a contract between Express Scripts and
22 Purdue Pharma on OxyContin for professional services.

23 We believe it's relevant to the case.

24 The second document I'd like to bring your
13:21:13 25 attention to with Express Scripts --

1 SPECIAL MASTER COHEN: Let's say that
2 that's sufficient for Express Scripts, just to move
3 things along, do you have something similar with Optum?

4 MR. FARRELL: Yes. I've got some really
5 good stuff on Express Scripts, but yeah.

Moving -- let's move on to Optum, and I'm
not going to burden you with the whole story.

8 Here's what has happened with Optum. Optum
9 has a more complicated history of mergers and
0 acquisitions, so I'm not going to burden you with the
1 complex story.

12 Here's what I do know that happened. I do
13 know that the prior OptumRx entity did not put OxyContin
14 on their formulary for a number of years.

13:22:03 15 I'm holding documents we purged
16 from -- now, none of these documents have come from
17 Optum. I'm holding documents from the Purdue production
18 where Purdue is identifying the fact that their P & T
19 committee rejected OxyContin on their national formulary;
13:22:24 20 identified they only had two of the 11 votes, and
21 identified a plan going forward to try to reverse that
22 decision.

23 So we know as early as '96, '97 --

1 were?

2 MR. FARRELL: No question.

3 SPECIAL MASTER COHEN: On the P & T

4 committee?

13:22:44 5 MR. FARRELL: No question.

6 SPECIAL MASTER COHEN: Go ahead.

7 MR. FARRELL: I have it here in my hand.

8 But now, that's not the real reason I think
9 we go back further with Optum.

13:22:52 10 Optum at its parent level has -- there's
11 two aspects to this. Not only was Optum had its own
12 rebate agreements and working as a PBM, but they also had
13 a media, a marketing company, and it's called
14 OptumInsight. It's a sister company.

13:23:15 15 They produced, in 2002, a memorandum,
16 OptumInsight, to Purdue Pharma on a management plan and a
17 marketing plan for pseudoaddiction.

18 MR. WEINBERGER: That was actually Ingenix.

19 MR. FARRELL: That was Ingenix, the
20 predecessor.

21 And I brought a copy if you want to see it.
22 I brought a copy if they want to go through it.

23 But as early as 2002, OptumInsight is
24 working with all of the front groups that we've alleged
13:23:54 25 Purdue Pharma used to advance it, and the language that's

1 in this memo prepared by OptumInsight says that people in
2 pain can't get addicted, there's no ceiling to the amount
3 of opium pills you can give them, and that
4 pseudoaddiction is real.

13:24:18 5 The language in here goes so far -- I'll
6 just let the document speak for itself. 2002,
7 OptumInsight is working with Laura Randa King at Purdue
8 Pharma to develop the national rollout of the marketing
9 plan to respond to issues of addiction and OxyContin, and
13:24:38 10 they use it as a -- as a platform to launch this drug on
11 America.

SPECIAL MASTER COHEN: Let's turn to data.

There are different flavors of data. For example, specifically pharmacies, it was 2006; not 1996.

13:25:04 15 A MALE SPEAKER: I'm having trouble hearing
16 you.

17 SPECIAL MASTER COHEN: Sorry.

13:25:12 20 MR. MOUGEY: Correct.

13:25:27 25 MR. MOUGHEY: Two or three weeks ago I think

1 I would have agreed with you that we could stick with the
2 2006.

3 But as we've pulled back the curtain on
4 these Purdue docs and starting to develop several
13:25:41 5 examples of what Paul just went through for the PBMs, I
6 don't see a reason to hook ourselves or hinge ourselves
7 to the prior dispensing or the ARCOS data.

8 One of the things that's always been
9 missing in this case, if you'll recall, was that 2006,
13:26:01 10 the first Congressional hearing on opiate OxyContin use
11 and abuse was in 2001.

12 And what we were always missing in this
13 case was kind of a baseline of where we started, so when
14 we had the data in 2006 we knew that there had already
13:26:16 15 been congressional hearings, there had already been open
16 investigations, and we couldn't really ever see exactly
17 what the baseline, where it started.

18 So we used public ARCOS going as far back
19 as we could. I don't remember exactly, but it gave us
13:26:30 20 the upward trajectory or the upward slope.

21 But if the defendants, PBMs, are in
22 possession of data going back that far, whether it's in
23 data warehouses, whether it's on tapes that need to be
24 backed up, wherever it is, to really see the impact of
13:26:50 25 the examples that Paul just went through and others,

1 there's no credible argument for how that data is
2 not -- when I say the data, I'm talking generally from
3 all different buckets and categories -- how those aren't
4 relevant to these claims going back to 1996.

13:27:07 5 It -- it's square on point for what this
6 case is going to turn into is what, what the baseline was
7 back in 1996, and how that proceeded because of the type
8 of materials that we're walking through, the contracts,
9 the relationships, the studies on pseudoaddiction, you
13:27:27 10 name it, the rebates, it's all of these forces combine
11 and the impact on the number.

12 MR. WEINBERGER: Can I just add something?

13 MR. MOUGEY: Of course.

14 MR. WEINBERGER: So the other thing is as
13:27:43 15 you know from the evidence that we brought to trial, we
16 can also use the data to analyze all sorts of patterns,
17 prescribing patterns, use patterns, et cetera.

18 In 2016, Optum, there's a document from
19 Optum Jeff Co. 359430 which was a PowerPoint that Optum
13:28:12 20 prepared that says as follows: "UnitedHealth Group
21 through its Optum division has one of the largest health
22 care data sets in the nation and its own big data
23 analytics environment that is unmatched in health care."

24 Now, this PowerPoint is about --

13:28:35 25 MR. HATCHETT: I'm sorry, we don't -- can

1 we pause just until we have a chance to get a copy of the
2 document?

3 MR. WEINBERGER: And so this is -- now
4 they're responding to the epidemic.

13:28:43 5 MR. HATCHETT: Sorry, Pete, can you hold on
6 one second until we have a chance to get a copy of the
7 document?

8 MS. MILDRED CONROY: Laura, I got it.

9 MR. WEINBERGER: I'm looking at 359446.
13:29:09 10 I'm reading from that.

11 "Capitalizing on these assets, we are now
12 building predictive modeling capabilities that will allow
13 us much greater leverage in getting ahead of the
14 problems, i.e. the opioid problems, before it's too
13:29:30 15 late."

16 You can read the rest of it yourself, but
17 most importantly it says here, "We can use this same
18 analytical capability to more closely monitor patterns of
19 prescribing and dispensing at the physician and pharmacy
20 level. We can identify -- when we identify outliers, we
21 can take appropriate action."

22 MR. HATCHETT: I'm sorry, Pete, I can't see
23 on this document.

24 Do you have a date for this document? Is
13:29:59 25 this one --

1 MR. WEINBERGER: 2016.

2 MR. HATCHETT: 2016, okay, great.

3 Thank you.

4 MR. WEINBERGER: Yeah.

13:30:05 5 So again, you can read the rest.

6 So, you know, the case is about what is the
7 earliest point in time when they had data that should
8 have been sending signals to them that they had to change
9 behavior in terms of, you know, what's -- what scripts
13:30:31 10 they were approving for payments and, you know, across as
11 you've heard earlier, across a whole range of chain and
12 independent pharmacies?

13 And as the epidemic is heating up in 2001
14 and 2002 and 2003, all that prior data is needed to
13:30:59 15 compare how the numbers are changing and how their own
16 big data analytics should have been looking at that and
17 figuring out, "How are we contributing to this
18 oversupply."

19 So, you know, it's about notice. It's
20 about foreseeability. It's about when the reports
21 are -- and we've got documents that, from Purdue, where
22 they're informing the PBMs of -- or the PBMs are learning
23 of the problems with abuse and diversion, you know, from
24 news reports in 2001.

13:31:54 25 And yet, you know, we know that it took

1 them until 2016 or '17 when the CDC finally decided that
2 there had to be, you know, a change in the policies and
3 regulations relating to OxyContin and the other Class 2
4 opioids to realize, well, oh, by the way, maybe we have
13:32:26 5 the data and the analytics capabilities to do something
6 about this.

7 Well, we say they should have been doing
8 something about it going back to the early 2000s.

9 MR. FARRELL: Let me make one final comment
13:32:41 10 before we pass it to our colleagues.

11 Special Master Cohen, you ordered the DEA
12 to turn over ARCOS data back to when they had it, and
13 that was 2006.

14 They appealed it, and Judge Polster
13:32:53 15 affirmed it.

16 The same thing happened with Cardinal
17 Health, McKesson and AmerisourceBergen, this Court
18 ordered them to produce the data they had back to when
19 they had it.

13:33:07 20 Cardinal Health's data went back to 2001.
21 They produced their data, their transactional data.
22 AmerisourceBergen, I think it was 2004, and McKesson was
23 sometime around the same time frame.

24 This Court has consistently held if you've
13:33:22 25 got the data, then produce it.

1 And so what I'm looking at in these
2 documents is they identified my hometown of Huntington,
3 West Virginia as a hot spot for OxyContin. It's in this
4 document in 2001. I want the data. I want to see what
13:33:42 5 they were seeing when they identified my hometown as a
6 hot spot for OxyContin in 2001.

7 And if they have that data, then they
8 need -- they should be ordered to turn it over.

9 MR. HATCHETT: I'm sorry, Special Master
13:33:58 10 Cohen.

11 Could I ask what document you're talking
12 about?

13 MR. MOUGEY: I'll just bring that in for a
14 landing.

13:34:12 15 The preliminary assessments of when the
16 defendants had data back to are just that, they're
17 preliminary.

18 As fields continue to be produced as
19 recently as the last 48 hours, and I understand they are
13:34:24 20 continuing to perform due diligence, but what I don't
21 want the takeaway from Paul to be at this point is that
22 whatever we say at this point is the date that we have
23 the data is somehow a cutoff line.

24 I think that we've tied the data in as far
13:34:38 25 back now as '96 to these contracts. That should be the

order. And if they don't have it, they don't have it.

13:35:08 10 So I believe that the order should be tied
11 back to the docs which is '96.

12 SPECIAL MASTER COHEN: I understand.

13 MR. MOUGEY: And then we can figure out how
14 long we have the data from there.

13:35:16 15 SPECIAL MASTER COHEN: I think counsel
16 opposite was asking you for the document ID of the one
17 you were just referring to.

18 MS. MILDRED CONROY: Yes.

19 MR. HATCHETT: It was not one of the
13:35:26 20 documents that was under discussion.

21 You referred to this document like it was
22 the document that was in front of the Court.

23 MR. FARRELL: I'll identify it for you
24 right now.

13:35:33 25 It's PPLPC, Papa Papa Lima Papa Charlie,

1 03500005854. It's a presentation by Purdue Pharma to
2 Express Scripts, and on Page 6 of the presentation it
3 says, "OxyContin hot spots," and it's a map with dots.

4 And if you'd like, I can read into the
5 record all of the hot spots they identified, or it can be
6 just self-evident in the document itself.

7 SPECIAL MASTER COHEN: Thank you.

8 Okay. So let me turn to the PBMs.

9 You know, the plaintiffs are correct when
13:36:18 10 they recite the history -- and I'm sure you're familiar
11 with it -- of both geographic and temporal scope. And,
12 you know, the Court weighed and reweighed and
13 re-reweighed what those scopes should be.

14 Circumstances are different because we've
13:36:36 15 got different defendants with different burdens and so on
16 and so forth.

17 Nonetheless, we're here in what is at least
18 analogous to a motion for reconsideration, and the point
19 being that all of those weighings were made carefully and
13:36:54 20 thoughtfully and, you know, the Court came to places
21 where it thinks the balance was properly measured.

22 And so what I think I need to hear for the
23 Court to move away from that is why things are
24 meaningfully different from what they have been so far
13:37:14 25 for the last six, seven years of this case.

1 MR. WASSERMAN: Sure. So Matthew Wasserman
2 for Express Scripts.

I first want to make sure we're on the same page about the data.

13:37:24 5 The plaintiffs have only asked for data
6 back to 2006. That's all that's been briefed. That's
7 all that's been met and conferred on. I went back and
8 checked the agenda just to make sure I wasn't forgetting.
9 It says, "Plaintiffs seek data back to 2006. PBM
10 defendants seek later dates."

When it comes to the data, there are differences for Express Scripts between the claims data and then the rebate and Admin fee data.

14 So claims data, we've already agreed to
13:38:00 15 produce 2008 through 2019. That's twelve years of data.

16 And I went back and looked at the pharmacy
17 orders that were on the docket in 2019. The pharmacies
18 had argued, "We should only produce three years of data."
19 You and Judge Polster disagreed; ultimately ordered them
20 to produce nine years of data, 2006 to 2014.

We're already agreeing to produce twelve years of claims data, 2008 through 2019.

23 We've laid out in our papers why pre-2014
24 data for Express Scripts is especially burdensome to
13:38:40 25 pull. It has to do with the merger with Medco, the data

1 being put on systems that are archived and offline.

2 We said we will take that burden, we will
3 go back to 2008.

4 The two years under dispute for claims data
13:38:56 5 for Express Scripts are 2006 and 2007. Those are the two
6 years we understand the plaintiffs want, and it's the two
7 years we say we can't give.

8 We put in a declaration from Al DeCarlo.
9 Those two years of claims data are on physical floppy
13:39:19 10 disks somewhere in our storage warehouse. They would
11 take immense work, twelve to 16 weeks, as estimated by
12 Mr. DeCarlo, to collect; that's if we can even find the
13 flash -- the floppy disks, analyze and produce.

14 And of course, that time could get wider if
13:39:38 15 the geographic scope is expanded.

16 On top of that, the plaintiffs
17 are -- earlier mentioned, well, the PBMs advertise data
18 as packaged and sold, so they already have this at their
19 fingertips.

20 Well, in our negotiations about data
21 fields, which aren't currently before you, we've told the
22 PEC, "We have a set of 40-some-odd data fields that we
23 frequently use and produce to our clients."

24 They've come back and asked for 400 data
13:40:12 25 fields. Those are data fields that have never been

1 pulled before, ever, especially for something as far back
2 as 2006 and 2007.

3 So you compound the geographic burden and
4 the data field burden.

13:40:27 5 And then all we're asking for on claims
6 data is that we not be ordered to produce '06 and '07.
7 That's on claims data.

8 MR. HATCHETT: I guess -- this is Andrew
9 Hatchett for Optum, before Matt continues.

13:40:44 10 In the plaintiffs' presentation I know
11 there was originally a question presented to them, and we
12 got into a lot of documents. In the course of that
13 discussion, you know, for us we have 10 different
14 defendant entities. We were provided one study proposal.

13:40:58 15 But we're presented with a lot of arguments
16 that conflate all of our defendant entities into one.
17 Also conflating the question of data and documents, but
18 we also are unique on data.

19 So I think it might be helpful to break
13:41:11 20 this up logically and let us respond to the data point
21 before we go into documents for Express Scripts, if that
22 makes sense, so that we can put data issues together.

23 MR. WASSERMAN: Yeah, I just want to finish
24 on rebate and Admin fees so you have everything from
13:41:25 25 Express Scripts.

1 MR. HATCHETT: I'm sorry, I thought you
2 were done on data.

3 MR. WASSERMAN: No problem. No problem.

4 Okay. So rebate and Admin fee, this data
13:41:33 5 is stored together.

6 You earlier asked, like, what is Admin fee.
7 It's basically, you know, a couple cent charge for each
8 transaction. It's like a transactional charge for the
9 PBM to adjudicate the claim.

13:41:45 10 That data, we've asked to only produce from
11 2014 forward. So whereas we're willing to go back to
12 2008 for claims data, rebate is 2014 forward. And the
13 reason for that is because the rebate and Admin fee data,
14 which is stored together, is stored on a system called
13:42:08 15 Optim, which I know is confusing but it's O-P-T-I-M.

16 It is 50 terabytes of data. It is
17 basically where everything from the company is stored
18 outside of the claims data. And it's partitioned into
19 140-plus separate data sets.

13:42:30 20 What Mr. DeCarlo testified to in his
21 declaration, it would take at least six months to restore
22 that data and the reason is because unlike, say, an
23 active database where you can run queries across, when
24 you have 50 terabytes of data and it's partitioned 140
13:42:51 25 times, you would have to go into each one of those data

1 sets, all 140-plus of them, and run your queries for
2 geographic scope, run your queries for national drug
3 codes.

4 It would take months to even determine the
13:43:10 5 size of the data that exists from pre-2014 for rebates
6 and Admin fee. It would take another couple months just
7 to analyze that data and pull the data fields that
8 plaintiffs want, the geographic area that's been told.

9 All of this is in the context of a June
13:43:32 10 14th deadline, which I know you know about, for us to
11 complete our data production.

12 I don't want to underestimate the burden for
13 producing any pre-2014 data for on the claims data side.
14 It will take many weeks to do that for us because it is
13:43:51 15 restoring offline databases.

16 But when it comes to rebate and Admin fee
17 from pre-2014, it would be at least a six-month process
18 to even restore that data, which would completely blow up
19 the schedule that's currently in place.

20 And then I just, one last point on rebates.
21 We think there's a limited need for the rebate data
22 pre-2014. This isn't a damages case. They don't need to
23 go line-by-line, dollar-by-dollar, cent-by-cent to figure
24 out how many dollars of rebates did you take in, how many
13:44:31 25 did you share with your clients.

1 They've already -- you've seen
2 today -- made their argument about rebates. They have
3 the rebate contracts. They're going to have all of our
4 custodial documents talking about rebates in real-time.
13:44:48 5 You're going to have e-mails saying, "We got this much.
6 We paid this much in this year at this time from this
7 manufacturer for this drug."

8 So they've already got the documents, the
9 rebate arrangements that they need to stand up before the
13:45:03 10 Court, before a jury, to make the argument that you heard
11 today.

12 What they don't need is cent-by-cent for
13 decades of every single claim that a rebate was paid on.
14 They don't need that transactional data to tell their
13:45:23 15 story.

16 So when you're looking at a six-month
17 burden to restore rebate data from an offline system that
18 is 50 terabytes and partitioned 140 times, compared to
19 what limited benefit they would get in getting dollars
13:45:41 20 and cents out of it, if you can even make sense of that
21 data, it's so old -- the data fields are going to be
22 different; there's going to be a whole bunch of
23 cross-referencing that Mr. DeCarlo explained in his
24 declaration -- we say they already have what they need to
13:45:56 25 make their argument when it comes to the rebate data.

1 SPECIAL MASTER COHEN: Let me stop and just
2 ask plaintiffs to respond to that.

3 MR. FARRELL: So briefly, if you order the
4 documents back to '96, then perhaps he's right, those
5 documents will have e-mails that contain discussions in
6 summary details of the data sets that we're looking for.

7 But you haven't; the Court hasn't ordered
8 documents back to '96, and the defendants certainly
9 haven't agreed to documents back to '96, so that's part
0 of the equation.

14 I think in this courtroom and in others
13:46:37 15 around the country, we have -- and I don't know what
16 documents we're talking about because I haven't seen them
17 yet, and maybe that's a step in this process that we need
18 to look at, but what are the documents that will give us
19 with specificity what those rebates are, who are they
13:46:53 20 from, and how do we get that into evidence, whereas the
21 data is much easier.

Now, that may be the easier step, but I'm
just anticipating as we sat in this courtroom and others
when we received objection after objection about trying
to get evidence in in front of -- with witnesses that

1 didn't have personal knowledge of a document potentially
2 because it's 20-something years old.

3 That, that being said, does that mean that
4 we can't figure out a way to address that issue on
13:47:25 5 rebates? And maybe that's a streamlined way to do it. I
6 think we could certainly explore that.

7 MS. McGOWAN: Special Master Cohen, if I
8 could address OptumRx's PBM claims and rebate data, and
9 then others on the team can address the documents point.

13:47:46 10 SPECIAL MASTER COHEN: Please.

11 MS. McGOWAN: You know, as you said at the
12 outset we can't produce what we don't have, and that's
13 the situation that we're in.

14 I actually am also quite surprised to hear
13:47:56 15 from the plaintiffs that they are seeking data before
16 2006 because I came to this meeting, after our meet and
17 confer process over the last several months, with the
18 understanding that they were seeking data from 2006
19 forward.

20 But for PBM claims data, we have explained
21 since January that we are willing to query three systems.
22 One is a live system. Two are legacy systems that are
23 still available, and that data on those systems is
24 available back to 2010.

13:48:27 25 And after asking multiple resources within

1 the company, multiple times, multiple ways, we have never
2 heard that there is pre-2010 data. And that has been
3 consistent.

4 We have even gone so far as to just ask the
13:48:43 5 system, "Do you have any pre-2010 data" so to speak, and
6 we identified one small pocket of pre-2010 data, and
7 described it in detail for the plaintiffs and would be
8 willing to produce from it for in scope drugs.

9 But we have not found a global source for
13:48:59 10 pre-2010 claims data, and at this point I have no reason
11 to believe that one exists.

12 On the rebate data, it's a similar
13 situation. It's a different system. We have employed a
14 similar approach. We've asked multiple team leads,
13:49:14 15 multiple people who work with the data regularly, is
16 there any way to get data before 2010 or 2008 on the
17 catamaran side, and repeatedly we've heard the same
18 answers, "No, we have provided what we have. It goes
19 back to 2010 or 2008. We have offered that to the
13:49:30 20 plaintiffs."

21 We did identify a backup tape on the rebate
22 data system, and we had the team work very hard and very
23 quickly to restore it and see was there data that went
24 back before 2010.

13:49:43 25 Answer: No.

1 So again, we cannot produce back before
2 what we have, and we have offered what we have.

3 On the mail-order dispensing system, we
4 have identified two systems: An active system and an
13:49:57 5 archive. We are willing to look in both of those
6 systems, and we believe that data go back to about 2011
7 in those systems.

8 To date, we have not identified a source of
9 pre-2011 data beyond learning that there was a legacy
13:50:12 10 system, but at this point I have talked to -- and I'm
11 going to underestimate here -- at least 10 people to say
12 where is it, what's on it, and could it be restored, and
13 I have not received an answer to that question that I
14 could report back here.

13:50:26 15 So to call that a preliminary assessment, I
16 think, underestimates the amount of work that we have
17 done to confirm what we have and to offer what we have to
18 the plaintiffs and what we could produce on the CMO
19 schedule.

13:50:44 20 MR. MOUGEY: If I may add just a couple
21 points real quick.

22 It is preliminary. And forgive my southern
23 colloquialism, but the proof is in the pudding. And
24 we've heard repeatedly about all the work that we've
13:51:00 25 done, and I understand it's a big company and there's a

1 lot of different places to look, but we've heard
2 repeatedly, "This is the end, this is all we have."

3 We're literally still getting new fields
4 within the last 48 hours. We're still getting new data
13:51:15 5 additions.

6 So I appreciate the continued follow-up,
7 but what we know today, and what we know two weeks from
8 now, and what we knew two weeks ago are materially
9 different.

13:51:26 10 And the issue isn't if the order -- if the
11 order matches the evidence and -- when I say "The
12 evidence," the documents that we found to date -- that
13 clearly gets tied back to 1996. And if we would have had
14 the tools to make these assessments earlier on, this
13:51:45 15 conversation could have had -- could have happened a
16 month-and-a-half ago.

17 But that's not what's happened. We've just
18 gotten access to some of these documents and understand
19 now what the temporal scope is a lot clearer than we did
13:51:57 20 two weeks ago.

21 So my simple ask is to not tie a date
22 artificially to what supposedly we have right now, as
23 that's a moving target.

24 SPECIAL MASTER COHEN: I want to take a
13:52:12 25 break and go back and kind of just chew on this for a

1 minute.

2 So we'll take a little bit of a break. But
3 before we do, I also want to ask a couple other questions
4 and make a couple other observations.

13:52:24 5 So while we're here, right, one of the, I
6 think, earlier -- but I don't really remember -- letters
7 from plaintiffs was a
8 discovery-request-by-discovery-request recitation of
9 where things stood.

13:52:42 10 And I believe that progress has been made
11 since then, but while we're altogether are there any
12 other topics that we should talk about now?

13 MR. HATCHETT: I guess I want to clarify.

14 I know you said you were going to go back.

13:52:56 15 We have only so far presented our story as
16 it relates to data, so I know that there's documents and
17 data, and the plaintiffs have conflated the two in their
18 discussion. We have different points that we would make
19 as to documents versus data.

20 So if that's part of what Your Honor -- the
21 Special Master is going to go back and think about, we
22 would like an opportunity to present the arguments we
23 would make on documents.

24 Of course, if you're looking at data, we
13:53:22 25 can come back and talk documents after our break.

13:53:33 5 But let me go back to the question I just
6 asked. Are there any other topics that we should chat
7 about that you see on the horizon or that you're just
8 stuck on and we should talk about while we're all here
9 together?

13:53:47 10 MR. FARRELL: Yeah, I think in general the
11 meet and confers with Express Scripts, they've
12 supplemented their discovery responses, and to the best
13 that I can say is there's a clear expectation or
14 understanding from the plaintiffs' perspective that ESI
15 understands what we're asking for, and that they're
16 looking forward to respond to those 35 discovery
17 requests.

18 Not so much with Optum.

19 So before we get to a discussion of
13:54:23 20 question-by-question-by-question whether or not we bring
21 a motion to compel, we really needed the bigger pictures
22 addressed: That's the temporal scope, the geographic
23 scope, and then which defendants are going to answer.

24 Whether or not --

13:54:41 25 SPECIAL MASTER COHEN: Let -- am I

1 interrupting?

2 MR. FARRELL: No.

3 SPECIAL MASTER COHEN: Let's talk about the
4 last one because that's actually something I wanted to
13:54:47 5 mention, and more particularly Judge Polster explicitly
6 asked that I mention, and that is so what he has said is
7 that the way these cases are going to get tried is that
8 Optum family entities are going to be referred to
9 collectively as Optum, and that ESI family entities are
13:55:11 10 going to be referred to collectively as ESI.

11 The same thing was true with the
12 Bellwethers that we've already tried, right? There
13 were -- I'm making it up -- you know, somewhere between
14 six and 60 CVS entities, and there were arguments over
13:55:29 15 reference at trial to one versus the other versus the
16 other.

17 And the Judge said, "That's not how this is
18 happening. CVS is going to be called CVS, and you all
19 have to figure it out."

20 And the way it was figured out was
21 essentially, "We'll agree to dismiss without prejudice
22 all of those other" -- I think; I might be saying this
23 wrong -- "We'll agree to dismiss without prejudice all of
24 those other entities with the understanding that either,
13:55:53 25 A, there is a CVS entity that can pay anything that

1 becomes necessary, indemnification or whatever it is, and
2 so they don't need to be here and all of those other CVS
3 entities get dismissed.

4 That's good because SEC reporting now, you
13:56:14 5 don't have all of those entities being sued, and they
6 don't have to include that on their balance sheet as a
7 potential liability, all of the good reasons that there
8 are for getting rid of those entities.

9 You've got a parent who is saying, "Look,
13:56:30 10 if there is a verdict, we can pay it," which is what the
11 plaintiffs are really concerned about. The discovery
12 still includes those folks. And/or that if we have to
13 figure it out, we'll figure it out later.

14 In other words, for example, with TEVA,
13:56:46 15 they just filed a stipulation on the record in the -- I
16 think it's the hospital cases, saying,
17 "We'll -- let's -- let's get to a verdict if there's
18 going to be one. If there's a verdict against TEVA, then
19 we'll go and litigate whether there's personal
20 jurisdiction against these other ones, but for now we
21 don't need to." Right?

22 So that was a convoluted way of saying that
23 the Judge is extremely interested in having you all
24 figure out a way to get to a similar point so that -- and
13:57:25 25 I think you've partly done it; I think you're on the way

1 there -- so that all of the defendant entities are
2 responding to discovery; that there will be reference to
3 those families with a single term; and that -- it's the
4 discovery issue that I'm most concerned about -- that you
13:57:44 5 can figure out a way to get rid of those other entities
6 as a practical matter as we litigate so there's no fights
7 about who's answering. It's just you all are answering.

8 That probably wasn't as clear as I wanted
9 it to be, but I hope you have a sense of what I'm trying
13:58:02 10 to get to.

11 MR. FARRELL: Yes.

12 Special Master Cohen, you have the three
13 co-leads for the PEC here, so speaking on our behalf, we
14 are familiar with this practice and with CVS.

13:58:13 15 And I think the cleanest way is for me to
16 state affirmatively on the record -- obviously we would
17 need client consent -- is that if, for example, Express
18 Scripts, if Express Scripts Inc. would stipulate or if
19 the family of Express Scripts, the Evernorth and all the
20 others, would stipulate that they would defend the
13:58:32 21 allegations in the complaint in the name of Express
22 Scripts Inc., and that the parent companies would
23 indemnify and hold harmless any liability, meaning the
24 Express Scripts Inc. is not an underfunded subsidiary, we
13:58:49 25 would be interested in going forward with the dismissal

1 without prejudice of the parent companies, which for
2 whatever reporting purposes, benefit it is for the
3 Court's purpose, allows us to move forward with Express
4 Scripts Inc.

13:59:06 5 With regard to Optum, I think they're
6 probably in even a better situation because of their
7 tree, that we would -- we would be willing to enter into
8 discussions, and we've communicated this with counsel, to
9 stipulate to the dismissal of UHG as the parent, and have
13:59:26 10 Optum Inc., and if you don't want Optum Inc. as the
11 holding company, OptumRx as the representative group
12 to -- for purposes of the allegations in the complaint,
13 with an agreed dismissal without prejudice with the
14 understanding that the parent companies or the holding
13:59:47 15 company would indemnify and hold harmless any judgment
16 against OptumRx and OptumInsight.

17 Now, again, it's a little complex because
18 Optum is divided out into three different entities,
19 right, but we would be -- we would call it all the same,
20 whatever they want to name it, Optum. They could get a
21 dismissal of their parent companies, defend in a single
22 name, and we would entertain that as well.

23 SPECIAL MASTER COHEN: I don't need a
24 response.

14:00:14 25 I'm just telling you you guys need to work

1 it out.

2 MR. COOPER: Yes. Special Master Cohen,
3 thank you.

4 This is Jonathan Cooper for Express
14:00:20 5 Scripts. And I understood we don't need to give a
6 response now, and obviously this is something we will
7 discuss with our client.

8 I just do want to note for the record two
9 things.

10 One is we're certainly open to streamlining
11 where we can without prejudice. That said, I think there
12 are some differences here, at least with respect to
13 Express Scripts. To give one example, Express Scripts
14 here and its family of entities is being sued in separate
14:00:44 15 capacities, for example, both as a PBM and as a
16 mail-order pharmacy.

17 And there are different entities that do
18 those things and they have different legal obligations.

19 And so I, you know, I think there could be
20 problems if you conflate those two into a single term
21 of -- and also conflating some of the obligations.

22 So this is something we'll have to look
23 through, and we're happy to discuss it with the PEC and
24 try to work something out the best we can without
14:01:09 25 prejudice to our client.

1 SPECIAL MASTER COHEN: I appreciate that.

2 I know the Judge is very anxious for that
3 to be addressed.

4 And, you know, you can be presented with a
5 possibility and find ways to get there or find ways not
6 to get there. And so the Court appreciates your working
7 your very hardest to find ways to get there.

8 MR. HATCHETT: So, Special Master, this is
9 Andrew Hatchett for the OptumRx defendants.

14:01:34 10 In -- I would agree that there are going to
11 be situations in this litigation, like the one that just
12 occurred, where it would make sense to use a single
13 moniker to describe the entities.

14 I think that on a more holistic standpoint,
14:01:53 15 we're not talking about a situation where it's only
16 OptumRx and two ultimate parents or two parents, an above
17 parent and an ultimate parent.

18 We also have cash card entities, we have
19 the OptumInsight defendants, we have OptumHealth. There
14:02:09 20 are 10 different defendants. Nine of them have moved to
21 dismiss based on a lack of personal jurisdiction.

22 We're engaging in discovery with respect to
23 those defendants under a stipulation and order that says
24 that we don't waive our jurisdictional defenses.

14:02:22 25 But the allegations that are directed, I

1 mean so today I guess when the plaintiffs were giving
2 their presentation, they would say things like "package
3 and sell data," which is not true.

4 And it's certainly not true for the PBM
14:02:35 5 entities, so the driving entity that was the, you know,
6 original defendant, OptumRx, which is why I say the
7 OptumRx defendants, is because that was the core
8 defendant in our family from the beginning.

9 And so as the amendments have happened and
14:02:49 10 other defendants have been added, they're referring to
11 entities that provide services that are very different
12 from PBM-related services.

13 And so there are going to be situations
14 where we believe it would be entirely inappropriate to
14:03:03 15 refer to those two entities collectively.

16 Obviously I don't think we have to resolve
17 for trial. I mean, my understanding is that these trials
18 will be remanded to different Courts. Judge Polster
19 won't try the cases.

14:03:16 20 And so maybe some of those things can work
21 out later.

22 I do think in the course of discovery there
23 will be opportunities to refer collectively to
24 defendants, but there may be situations where we need to
14:03:31 25 carve out the defendants separately and respond

1 separately for individual entities.

2 And so obviously we can brief those issues
3 in various contexts.

4 I understand the Court's desire to
14:03:43 5 streamline, and we support that and can get behind it,
6 but there are situations that I can envision where that
7 would result in a prejudice, and so we would need to
8 raise those as they occur.

9 MR. FARRELL: Special Master Cohen, I think
14:03:52 10 that belies a fundamental obstacle moving forward.

11 CVS was sued as a pharmacy, CVS of Ohio,
12 CVS distribution facility, and the CVS parent company.

13 Different DEA regulations, different
14 purposes, different roles, different holding companies,
14:04:14 15 and we were able to work it out.

16 SPECIAL MASTER COHEN: Yeah.

17 Look, I can tell you that the Judge,
18 Andrew, the Judge really wants this to be simplified as
19 much as possible.

20 He would prefer not to even deal with your
21 motions to dismiss on personal jurisdiction because it
22 can be worked out. It has been before by other
23 defendants in other cases.

24 So I'm really urging you very, very, very
14:04:36 25 strongly, as strongly as I can -- if the Judge reads this

1 transcript he's going to see me saying this on his
2 behalf -- if you figure out how to minimize the number of
3 parties, come to agreements, so that even the
4 jurisdictional motions don't have to be addressed. Okay?

14:04:54 5 I heard you.

6 MR. HATCHETT: Certainly we would be happy
7 to engage with the plaintiffs on that.

8 I mean, if there are opportunities to
9 minimize the number of defendants that are involved in
14:05:02 10 the case, without making sure it's not to our prejudice
11 to do so, we will certainly do so.

12 SPECIAL MASTER COHEN: Yeah, and the other
13 defendants might be able to help you explain how they got
14 there.

14:05:12 15 MR. HATCHETT: And we have definitely
16 engaged in discussions I know with respect to the
17 ultimate parents.

18 I know that we have a wider range of
19 entities that are involved. And if there are
14:05:22 20 opportunities to reach some sort of agreement that would
21 encompass the other entities as well, I certainly think
22 that, you know, we would be happy to engage in those
23 conversations.

24 SPECIAL MASTER COHEN: Okay. So before I
14:05:30 25 go back and noodle, you wanted to touch on other aspects

1 of what we were discussing.

2 MR. BADALA: Special Master Cohen, just
3 before we get back into that, this should be
4 noncontroversial, but this is Salvatore Badala from
14:05:48 5 Napoli Shkolnik.

6 We've received back waivers of service from
7 ESI. We haven't received them back from Optum.

8 We just want confirmation that they will be
9 signing those waivers of service for CT-12 through 15.
14:06:04 10 We've asked for confirmation as late as yesterday, but we
11 haven't received them back.

12 MS. McGOWAN: Yes, Sal.

13 MR. BADALA: Great. Thank you.

14 MR. WASSERMAN: So, Special Master, Matthew
14:06:17 15 Wasserman.

16 Before I hand it over to my colleague Sage
17 Vanden Heuvel to try his hardest to convince you on the
18 document temporal scope, just to put a quick pin on data
19 temporal scope I would just point you to Tab 341-S.

20 341-S, Pages 4 through 8, I think that
21 cleanly lays out what is actually in dispute with respect
22 to Express Scripts' data. I know there's a lot of tabs,
23 a lot of years, a lot of categories, so I just wanted to
24 put that on your radar.

14:06:46 25 SPECIAL MASTER COHEN: I'm sorry, you said

1 34-S, and then what page?

2 MR. WASSERMAN: 341-S, and it's Pages 4
3 through 8 of that letter.

4 SPECIAL MASTER COHEN: Got it.

14:06:54 5 MR. WASSERMAN: Thank you.

6 MR. VANDEN HEUVEL: Your Honor, Sage
7 Vanden Heuvel for Express Scripts.

8 So I'm just going to be talking about the
9 temporal scope of documents.

14:07:02 10 The plaintiffs stated that the burden issue
11 of producing documents back to 1996, which is now 28
12 years ago, is a separate issue, and that the key issue
13 for the Court is just relevance.

14 But under Rule 26, as this Court knows, the
15 Court has to weigh both the burden as well as the
16 relevance, and determine whether this discovery is
17 proportionate to the needs of the case. And producing
18 documents going back 20 to 30 years is extremely
19 burdensome.

20 I know from working on this case the past
21 several years, just getting documents from 2006 to 2010
22 is extremely hard. Getting documents from the early
23 2000s to the '90s would be a monumental task.

24 And the Court stated that this is
25 essentially a motion for reconsideration, and the

1 plaintiffs --

2 SPECIAL MASTER COHEN: Analogous to.

3 MR. VANDEN HEUVEL: Analogous. Analogous

4 to it.

14:07:58 5 The plaintiffs have not put forth any new
6 law or circumstances that would justify giving the PBMs a
7 much greater temporal scope than the distributors or the
8 manufacturers.

9 SPECIAL MASTER COHEN: Manufacturers were
14:08:08 10 back essentially to 1996.

11 MR. VANDEN HEUVEL: Excuse me, the
12 distributors and the pharmacies.

13 The manufacturers had to produce discovery
14 back to one year before the relevant drugs were released,
14:08:18 15 so not every manufacturer had to produce drugs -- produce
16 discovery back to the '90s.

17 The plaintiffs have argued that essentially
18 Express Scripts was colluding with Purdue.

19 First of all, we disagree with that, you
14:08:34 20 know, that characterization.

21 This contract that they put before the
22 Court, a rebate agreement, you know, this was just a
23 standard rebate agreement that PBMs entered into with
24 many manufacturers in order to reduce the price of
14:08:48 25 FDA-approved drugs for their plan-sponsored clients.

1 You know, this is not collusion, this is
2 not conspiracy. This is just an arm's length business
3 transaction.

4 And I would note that in Track 1 the
14:08:59 5 plaintiffs also argued that there was a conspiracy
6 between the manufacturers, there was a conspiracy between
7 the manufacturers and the distributors, as well as the
8 pharmacies.

9 They made that, those same allegations back
14:09:10 10 then. And the Court didn't, as a result of that
11 allegation, determine that everyone had to produce
12 discovery back to 1996.

13 So I don't think that any different outcome
14 should happen here. Just because they've alleged
14:09:24 15 conspiracy does not mean that the burden of producing
16 documents from 20 and 30 years ago is justified by those
17 allegations.

18 And by the way, these rebate agreements,
19 we've already agreed to produce those as far back as we
14:09:39 20 have them back to the 1996, if we have them. So to the
21 extent that they think that there's a conspiracy or
22 collusion set forth in these contracts with Purdue, we're
23 willing to produce those.

24 But what the plaintiffs are asking here is
14:09:50 25 for a much greater burden to be put on the PBMs than was

1 put on almost any other defendant in the MDL, because
2 they're not limiting their discovery requests just to one
3 particular drug or one particular geographic area. They
4 want us to produce all of our discovery for all of their
14:10:10 5 requests essentially back to 1996.

6 And we just don't see the relevance of
7 these allegations supporting such a burden.

8 Now, I'm not arguing that these allegations
9 are irrelevant. I'm just saying that when you go back
14:10:26 10 further in time, based on the allegations set forth in
11 their complaints, it just becomes less relevant.

12 And they have plenty of discovery, both
13 from Purdue's documents that are in the MDL repository
14 that they've cited today and that they've noted in their
14:10:39 15 letters, to make their case regarding this collusion or
16 conspiracy allegation.

17 And they also have, you know, plenty of
18 documents from 2006 forward to make their case regarding
19 the PBMs' interactions with opioid manufacturers, the
14:10:57 20 PBMs' formulary design, the PBMs' utilization management
21 processes in order to make their case.

22 I don't think that there's any
23 justification for putting on that burden of producing
24 documents all the way back 28 years in this matter.

14:11:16 25 MS. STRUMPH: And if I may for OptumRx,

1 this is Carolyn Strumph, I just want to build on what my
2 colleague at Express Scripts said with respect to OptumRx
3 specifically and the documents that plaintiffs' counsel
4 flagged earlier.

14:11:28 5 So the document that was shown that was a
6 rebate agreement between Prescription Solutions, which is
7 a predecessor entity to OptumRx, and Purdue Pharma, that
8 is just a rebate agreement. That doesn't tell us
9 anything. It's a contract.

14:11:43 10 And the fact of the existence of a contract
11 going back to a particular date does not necessarily
12 warrant the broadly sweeping discovery that plaintiffs
13 seek back nearly 30 years.

Also, Prescription Solutions around that time was described in the same Purdue documents that were cited in the PEC's position paper as a small California-based PBM.

18 So none of the Bellwether jurisdictions are
19 in California. And there's no evidence or even
14:12:12 20 allegation that this contract with a California-based PBM
21 back in the late 1990s somehow had some influence in the
22 Bellwether jurisdictions, which are not on the west
23 coast, which are largely in the middle of the country and
24 on the east coast.

14:12:27 25 SPECIAL MASTER COHEN: Are you saying that

1 that contract isn't representative of what -- of what all
2 the other contracts were with every other jurisdiction?

3 I mean, I think it's -- you're suggesting
4 that because it's a California contract it has nothing to
14:12:40 5 do with these cases. That doesn't sound right to me.

6 MS. STRUMPH: And I'm sorry if I misspoke.

7 I don't believe it's a California contract.

8 What I'm saying is that the clients that
9 Prescription Solutions served around that time were
14:12:50 10 largely California-based clients, and so in order for any
11 rebate agreement that Prescription Solutions entered into
12 to have any effect on the Bellwether jurisdictions, there
13 would have had to be members of the health plan clients,
14 of Prescription Solutions health plan clients would have
14:13:09 15 to be members living in those Bellwether jurisdictions
16 who then, you know, processed prescriptions for opioids
17 at issue in the case.

18 So the existence of the contract itself
19 does not tell us that there is any, any influence, any
14:13:21 20 impact in the Bellwether jurisdictions.

21 And just one more point I want to raise.

22 You know, we've talked a little bit about
23 the discovery that was ordered as to the distributor
24 defendants and the pharmacy defendants.

14:13:33 25 And, of course, I don't represent a

1 distributor defendant so maybe I'm speaking a little bit
2 out of turn here, but I have to imagine that the entities
3 that physically move opioids around the country had a
4 relationship with drug manufacturers back in the 1990s.

14:13:47 5 I don't know what contracts they were, what
6 communications they had, what documents they exchanged,
7 but the fact of a document or a contract between
8 Prescription Solutions and Purdue Pharma or any other
9 drug manufacturer does not -- does not warrant discovery
14:14:03 10 going back so far.

11 It didn't for the distributor defendants,
12 who I'm certain had documents between them and the
13 various drug manufacturers dating back to the late 1990s.
14 But even then, discovery was ordered back only to 2006.

14:14:16 15 And we would ask for the same treatment
16 here. There's no reason to treat the PBMs differently
17 from the distributor defendants at this time.

18 SPECIAL MASTER COHEN: Okay. Let's take
19 15.

14:14:30 20 It's call it 2:15. We'll be back at 2:30.
21 MS. SINGER: Special Master Cohen, Linda
22 Singer.

23 Will we have a chance to respond before you
24 issue your decision?

14:14:42 25 SPECIAL MASTER COHEN: Let's do it now.

1 You've got just a minute or two.

2 MS. SINGER: Hearing your excitement, I
3 will keep it short.

4 So I just want to respond on some of the
14:14:59 5 OptumRx points.

6 SPECIAL MASTER COHEN: Trying to get you on
7 your plane.

8 MS. SINGER: What?

9 SPECIAL MASTER COHEN: I'm just trying to
14:15:04 10 get you on your plane.

11 MS. SINGER: Thank you.

12 So in terms of OptumRx and temporal scope,
13 one of the things -- and I think Mr. Weinberger referred
14 to this earlier -- but I want to refer you back to your
14:15:18 15 own ruling, discovery ruling three, where you cite an
16 earlier decision, *In Re: Welding Fume Products Liability*
17 *Litigation*, which I know you know well.

18 But in that order you reference the fact
19 that a document that tends to show, for example, that a
20 defendant knew in 1940 that exposure to the product was
21 dangerous and damaging was still relevant even though the
22 plaintiff in that case wasn't exposed until years later.

23 One of the documents that we referred to
24 from OptumRx, which is PPLPC 029000037059, is a document
14:15:57 25 in which a United employee talks about overpromotion of

1 opioids, abuse of OxyContin, a significant increase in
2 pharmacy trend and, most importantly, an increase in
3 patient morbidity and mortality, and asks what they're
4 doing to deal with that.

14:16:19 5 This defendant family had knowledge of
6 abuse, diversion, morbidity and mortality back to
7 19 -- to 2001, and yet continued to accept rebates and
8 enter into agreements to allow it to collect profits
9 related to opioids.

14:16:38 10 And they acknowledge their internal
11 discussions, the debates they were having, none of which
12 would be available through manufacture documents are
13 critical in this case and justify this scope of
14 discovery.

14:16:50 15 These defendants have been defendants in
16 this case through 2018; should have litigation holds in
17 place; and there's no additional burden. They've gotten
18 a benefit from having been able to stand on the sidelines
19 for five years.

14:17:02 20 There are other documents. I don't want to
21 belabor it, though.

22 MR. HATCHETT: I just want to clarify that
23 the document that's been passed around is a communication
24 between Purdue and UnitedHealth Care; not UnitedHealth
25 Group or any of the defendants in the case.

1 UnitedHealth Care is actually not a
2 defendant. It's actually a plaintiff in the case.

3 So they are citing a document between
4 Purdue and the plaintiffs; not a defendant.

14:17:23 5 Thank you.

6 SPECIAL MASTER COHEN: Okay. Now it is
7 2:15, so I'll see you at 2:30.

8 (Recess taken.)

9 SPECIAL MASTER COHEN: So there is no
10 science to weighing all of the factors under Rule 26, the
11 relevancy of the information, the data, and the
12 documents, the burden on the defendants in producing
13 them, and there are different kinds of data and different
14 kinds of documents.

14:41:49 15 And the Court has weighed, like I said,
16 weighed these issues many times before with different
17 varieties of defendants, which makes all of it hard for
18 me. But that's part of the job.

19 So I'm going to tell you where I've landed
20 on these issues, and I'm really just going to bottom line
21 it. Maybe give a bit of an explanation, but most of the
22 explanation really comes down to things I've already
23 said, and I feel like I don't need to repeat them.

24 So with regard to documents as to both
25 Optum and ESI, those are going to go back to 1996. It

1 comes down to the deep central relevance of all of those
2 documents.

3 There's been already enough of a showing
4 that there are documents that range back to that age that
14:42:49 5 are extremely relevant to the claims that have been made,
6 and I just think that it's appropriate for the defendants
7 to have to try and find those documents running back to
8 1996.

9 Now, I will say that part of the reason for
14:43:05 10 that is also that I accept your argument, Mr. Wasserman,
11 that it is the documents that would show things that they
12 don't need data for. That argues for the production of
13 documents. And as you'll see when I get to data, I
14 accept also, to some extent, that they don't need the
14:43:32 15 data if they get the documents.

16 So that's documents.

17 As for data, first talking about Optum,
18 Optum essentially says, "We have, for example, claims
19 data going back to 2010. We don't have anything older
14:43:52 20 than that. We've looked."

21 "Admin, you know, rebate and Admin, same
22 thing, we have it back to 2010 or 2008. We don't have
23 anything older."

24 As I said, if you don't have it, you don't
14:44:07 25 have it. But you're going to need to go and look for it

1 at least through 2006. I want you to look for data going
2 back to 2006. And if you find it as discovery
3 progresses, as documents are produced that reveal that
4 maybe there are, you know, pockets of data somewhere,
14:44:24 5 then you'll have to produce it.

6 It's happened before. We've certainly seen
7 in this litigation parties find out that they were wrong
8 with their first understanding innocently because, you
9 know, there was a computer somewhere or whatever it is
14:44:37 10 that has data.

11 The baseline is the same for ESI with an
12 exception.

13 I understand that, you know, you say that
14 your claims data to 2008 is simple enough; it's going to
14:44:53 15 take some work to get it back to '06. You need to do the
16 work for the claims data.

17 The dispensing data back to 2006, also.

18 With respect to the rebate and Admin data,
19 this is where I'm accepting your suggestion that, you
20 know, if it's going to take six months to reproduce that
21 data, to make that data available, then that's a pretty
22 big burden.

23 You need to produce that back to 2014, but
24 I'm leaving open whether you then have to produce it back
14:45:26 25 to 2006 to see what the documents show.

1 If it ends up that you are correct and that
2 the documents -- and when I say documents, I mean e-mails
3 and reports and contracts and everything else that is a
4 document; that isn't a set of numbers or, you know, a big
14:45:45 5 fat spreadsheet -- if those give the plaintiffs the
6 necessary information to make the arguments that they
7 seek to make regarding rebate and Admin, I'm not saying
8 that they -- I mean, the evidence might prove that they
9 can't make that argument at all, but you understand what
14:46:04 10 I'm saying, that that will be the end of the question.

11 But if that's not true, then the question
12 of whether rebate and Admin data before 2014 is produced
13 is still an open one. At this time I'm not going to
14 order it.

14:46:22 15 And that is my ruling on all of those
16 issues.

17 One thing I'll close with is that I am
18 going to be out of the country between April 18th and May
19 1st, so as things come up, I'll be less available during
14:46:39 20 that period of time than normal.

21 You can reach out to Scott, and also
22 Michael Borden, who most of you know, if anything comes
23 up during that period of time.

24 MR. FARRELL: Can we get an e-mail address?
14:47:01 25 SPECIAL MASTER COHEN: Just one second.

1 Yeah, I'll get you that.

2 Scott reminded me that I'm doing this from
3 memory and forgot to talk about geographic scope.

4 So geographic scope is going to be
5 statewide in all three states. I honestly tried hard to
6 figure out a way to make it something less than that and
7 still have it be fair, and I don't think it's possible.

8 As I've said, the question of geographic
9 scope has been addressed repeatedly, and we've kind of
10 come to an equipoise with respect to other defendants.

11 And plaintiffs are correct that they have consistently
12 asked for more and not received it.

13 The Court has made statements, both I and
14 Judge Polster have made statements that we think that a
15 regional and a national scope is not out of the question,
16 but we've landed on statewide.

17 And I think that the same analysis applies
18 here. There are some differences around the edges, but
19 not enough of a difference to make a difference in the
20 ruling.

21 I do believe that statewide is an
22 appropriate geographic scope for all three states.

23 MR. FARRELL: And to be clear -- this is
24 Paul Farrell -- you're talking about making, in essence,
25 a category two discovery for the claims data?

1 | SPECIAL MASTER COHEN: Correct.

2 MR. COOPER: Special Master Cohen, Jonathan
3 Cooper for Express Scripts.

For all of the rulings from today, I know we talked specifically about the P & T identities, but for all the other ones are you planning to issue any further opinions?

14:48:57 10 I don't know if there will be on other
11 issues, but just to make that clear.

12 SPECIAL MASTER COHEN: Yes. Thank you.

13 So I thought about that, and to be honest I
14 think that the Court and I have both written on all of
14:49:07 15 these questions before sufficiently, that we've discussed
16 it sufficiently, and that your letters have been very
17 thorough on all of these issues.

18 And ultimately what I'm saying is that for
19 the reasons expressed in the letters that support my
20 decisions, that's why I'm deciding the way I am.

As for deadlines, you know, there's a lot
there. Again, it's been so thoroughly written up in
letters that it doesn't seem to me that it's going to
take a long time to create an objection.

In fact, what the parties have done before

1 sometimes is just file a pretty short objection and
2 append their letters, which the Court then reviews.

3 But I guess I'll ask you again, do you feel
4 like there's a time within which you can get something to
14:50:00 5 the Court, knowing that we are trying to get things
6 moving?

7 MR. COOPER: So I can't speak -- I can
8 speak for Express Scripts, of course.

9 You know, given that there's been a series
10 of rulings, and it will take us a little bit of time, I
11 think, to digest them, could we have -- I know you
12 indicated before maybe 10 days would be appropriate.

13 Could we have the 10-day period maybe for
14 all objections to the rulings today, including the P & T
14:50:27 15 issue?

16 SPECIAL MASTER COHEN: Well, especially
17 because I still think it would be appropriate for you
18 folks to chat about the P & T issue and the extent to
19 which maybe you can carve out more.

20 And, frankly, if the plaintiffs have the
21 evidence that they suggest they have, that they already
22 have got some of this information, maybe that changes
23 your thinking.

24 MR. COOPER: Just to be clear, they don't
14:50:45 25 have it for Express Scripts is my understanding. For

1 other PBMs maybe, but not Express Scripts.

2 SPECIAL MASTER COHEN: So today is the
3 28th, so why don't we say that all objections are
4 due -- do you really -- I guess April 8th, right? Is
14:51:01 5 that 10 days?

6 Am I reading that correctly?

7 MR. COOPER: That's 11 days because 10 days
8 would be a Sunday.

9 SPECIAL MASTER COHEN: That's fine.

14:51:08 10 April 8th.

11 MR. COOPER: Thank you.

12 SPECIAL MASTER COHEN: Thank you.

13 MR. VANDEN HEUVEL: Your Honor, this is
14 Sage Vanden Heuvel for Express Scripts.

14:51:19 15 I just want a clarification on the temporal
16 scope of documents.

17 In your prior rulings you had, for example,
18 for the manufacturers, you'd required Purdue to produce
19 OxyContin-related documents back to, you know, 1996.

14:51:31 20 In your ruling today, my understanding from
21 the plaintiffs is the reason they wanted back to the '90s
22 is because of the relationship between the PBMs and
23 Purdue.

24 I'm curious whether your ruling today is
14:51:45 25 limited, could be limited to just OxyContin

1 Purdue-related documents, or whether it's just all
2 general discovery?

3 | SPECIAL MASTER COHEN: All documents.

4 MR. VANDEN HEUVEL: Okay.

14:51:56 5 MR. FARRELL: This is Paul Farrell again.

6 You said April 8th to serve objections, and
7 the time frame for us to respond or counter, the
8 nonobjecting party to respond?

11 MR. MOUGEY: No. No. No. Because you're
12 going out of town April 18th, right, out of the country?

14:52:24 15 MR. MOUGEY: Right.

16 I'm hoping that -- I'm just thinking, do we
17 want to have this run out. I think we would rather have
18 this run its course with Special Master Cohen still here,
19 and I'm not the one drafting it, but wouldn't we want to
20 get this turned around?

21 MR. FARRELL: Here's what we propose is 10
22 days to respond -- 10 days to lodge an objection.

23 And then are you going to allow a reply to
24 the response to the objection?

14:52:59 25 SPECIAL MASTER COHEN: No.

1 MR. FARRELL: So because we're basically
2 setting standards here.

3 So --

4 SPECIAL MASTER COHEN: This is for this.

14:53:10 5 MR. FARRELL: April 8th is the time for the
6 objection.

7 We will -- we will respond to the objection
8 by April 18th or sooner.

9 SPECIAL MASTER COHEN: That's fine.

14:53:27 10 MR. HATCHETT: I was going to say,
11 obviously we'll discuss with our client, discuss
12 internally about whether we will lodge objections. We
13 understand the deadlines.

14 I mean, one thing to note, just to be
15 clear, given the age of the allegation, going back to
16 1996 may not result in a material volume of documents.

17 As we've looked back over time, for some of
18 our defendants, many of them, we just don't have
19 documents back that far, and so I don't want there to be
20 an assumption because we have gone back that far, that
21 therefore that means there's a trove of documents, but we
22 understand your order.

23 SPECIAL MASTER COHEN: I've always said if
24 there is nothing to discover, then you can't produce it.
25 If there are no documents, you can't produce them.

1 The obligation is to look.

2 Thank you, all, for coming in.

3 Travel safe.

4 MR. MOUGEY: I have a quick request.

14:54:19 5 SPECIAL MASTER COHEN: Sorry.

6 MR. MOUGEY: Can we get something on the
7 calendar before you go as kind of a catch -- catch-all
8 issues that arise prior to April 18th for a Zoom?

9 SPECIAL MASTER COHEN: Yes, you can.

14:54:29 10 MR. MOUGEY: Okay. Do you want us just
11 to -- do you want to give us a chance to -- do you want a
12 chance to look at your calendar and give us a date, or do
13 you want --

14 SPECIAL MASTER COHEN: Well, what are you
15 talking about, a Zoom conference to discuss whatever
16 comes up between now and then?

17 MR. MOUGEY: Yes.

18 Because otherwise we will be in early May
19 before we could circle back again.

14:54:47 20 SPECIAL MASTER COHEN: I think that's
21 probably smart.

22 MR. MOUGEY: Maybe we won't need it.

23 SPECIAL MASTER COHEN: Tax day. Might as
24 well make it as pleasant as we can make it. April 15th
14:55:37 25 at, let's say, 1:00 o'clock.

1 And to make that work, it will be the same
2 process where you're going to need to get materials to
3 Josh Gay who will collate them and get them to me in time
4 for me to read them.

14:56:02 5 So if we're talking April 15th, that should
6 probably be completed by the 11th so I'll have time to
7 read it.

8 MR. MOUGEY: Thank you.

9 SPECIAL MASTER COHEN: Okay. Work
14:56:16 10 backwards from there.

11 Thanks, everybody.

12 Travel safe.

13 Michael@bordenadr.com.

14 Andrew.scott.loge@outlook.com.

14:56:20 15 (Proceedings concluded at 2:56 p.m.)

16 - - - -

17 C E R T I F I C A T E

18 I certify that the foregoing is a correct
19 transcript from the record of proceedings in the
20 above-entitled matter.

21 /s/Susan Trischan

22 /S/ Susan Trischan, Official Court Reporter
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